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# UNTYING THE KNOT: AN ANALYSIS OF THE ENGLISH DIVORCE AND MATRIMONIAL CAUSES COURT RECORDS, 1858–1866

Danaya C. Wright \*

## I. INTRODUCTION

Historians of Anglo-American family law consider 1857 as a turning point in the development of modern family law and the first big step in the breakdown of coverture<sup>1</sup> and the recognition of women's legal rights.<sup>2</sup> In 1857, The United Kingdom Parlia-

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\* Associate Professor of Law, University of Florida, Levin College of Law. This article is a continuation of my research into nineteenth-century English family law reform. My research at the Public Record Office was made possible by generous grants from the University of Florida, Levin College of Law. I would like to thank the faculty at the University of Florida and Washington and Lee University for their valuable comments at presentations, and I would like to thank Bill Nelson, John P. Reid, and the New York University School of Law Legal History Colloquium for their comments and suggestions. I would also like to thank the following people for their comments, support, and enthusiasm: Barbara Bennett Woodhouse, Berta Esperanza Hernandez-Truyol, Sharon Rush, Nancy Dowd, Greg Alexander, David Papke, Margaret Brinig, Katherine Bartlett, Norma Basch, and Michael Gold. Enormous thanks go to Kendal Broad and Liz Fakazis who lived with this article almost as much as I did.

1. Coverture is a legal doctrine in which a woman's legal existence is subsumed into that of her husband upon marriage. While in a state of coverture—so long as she remains married—she is unable to own property, control her own wages, enter into contracts, make her own will, or be sued. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*442.

2. See A CENTURY OF FAMILY LAW: 1857–1957 (R.H. Graveson & F.R. Crane eds., 1957); W.R. CORNISH & G. DE N. CLARK, LAW AND SOCIETY IN ENGLAND: 1750–1950 (1989); A.V. DICEY, LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 43–44 (2d ed. 1914); ALLEN HORSTMAN, VICTORIAN DIVORCE (1985); B.H. LEE, DIVORCE LAW REFORM IN ENGLAND (1974); O.R. MCGREGOR, DIVORCE IN ENGLAND: A CENTENARY STUDY (1957); MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND (1989) [hereinafter SHANLEY, FEMINISM]; LAWRENCE STONE, BROKEN LIVES: SEPARATION AND DIVORCE IN ENGLAND, 1660–1857 (1993) [hereinafter STONE, BROKEN LIVES]; LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530–1987 (1990) [hereinafter STONE, ROAD TO DIVORCE]; Rebecca Probert, *The Double Standard of Morality in the Divorce and Matrimonial Causes Act 1857*, 28 ANGLO-AMER. L. REV. 73 (1999); Mary Lyndon Shanley, "One Must Ride Behind": *Married Women's Rights and the Divorce Act of 1857*, 25 VICT. STUD. 355 (1982) [hereinafter Shanley, "One Must Ride Behind"]; S.M. Waddams, *English Matrimonial Law on the Eve of Reform, 1828–1857*, 21 LEGAL HIST. 59 (2000); Sybil Wolfram, *Divorce in England: 1700–1857*, 5 OXFORD J. LEGAL STUD. 155 (1985);

ment ("Parliament") created a new civil court to handle all divorce and matrimonial causes, removing the jurisdiction of: the ecclesiastical courts over marital validity; the Chancery over custody of children and separate estates; the royal courts over marital property; and Parliament over full divorce.<sup>3</sup> The new Divorce and Matrimonial Causes Court, a wing of the admiralty and probate courts, would handle all matters familial beginning in 1858.<sup>4</sup>

The idea of creating a unified court to handle all issues of family breakdown was a product of the nineteenth-century reform movement and a recognition that the family was a social institution that deserved a protected legal status. Rather than continue to treat family property as a subset of property law and child custody as a part of the Chancery's *parens patriae* jurisdiction, this new court brought legal disputes together around a central characteristic: the family. The family, or at least the marital couple, emerged as a legal entity around which ancillary family-related legal issues would revolve. The rights and duties associated with family relationships were defined first by reference to the family, and only second by reference to the property, custody, or equity issues that arose in family creation and family breakdown.

The 1858 divorce court was the first attempt in the Anglo-American legal system to create a court specially dedicated to the family,<sup>5</sup> a court that would take a holistic approach to what was

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Margaret Woodhouse, *The Marriage and Divorce Bill of 1857*, 3 AM. J. LEGAL HIST. 260 (1959).

3. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85 (1857) (Eng.). For a history of the debates leading to the creation of the divorce court, see SHANLEY, *FEMINISM*, *supra* note 2; STONE, *ROAD TO DIVORCE*, *supra* note 2; Shanley, "One Must Ride Behind," *supra* note 2; Danaya Wright, *The Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 COLUM. J. GENDER & L. 175 (2002) [hereinafter Wright, *The Crisis*].

4. 20 & 21 Vict., c. 85 (Eng.).

5. Of course, legal scholars are not unaware of the multiple definitions of family that exist, and that anthropological usages of the term may differ from legal usages. Where anthropologists might refer to clans, political groupings, persons related by blood, as well as the Victorian nuclear family all by the term "family," lawyers use the term more narrowly to describe the marital and parental relationships that give rise to changing legal status and corresponding rights and obligations. For anthropologists and sociologists, marriage may be rooted in the family, but for lawyers, the family is rooted in marriage. Through marriage, independent legal actors acquire new rights and obligations toward each other, their offspring, and their property. Placing marriage at the center of the family means that family law is centered on the legal events of marriage, divorce, childbirth, death, and adoption. And while there were clear laws dealing with these family issues prior to 1857, they had not been officially aggregated into a single, interrelated area of law in which determinations in one area would affect other areas. The 1858 court created a space in which all family-related issues would become interlinked and interdependent. See, e.g., CORNISH & CLARK, *supra* note 2, at 382-90; STEPHEN CRETNEY & J.M. MASSON, *PRINCIPLES OF*

perceived in the 1850s to be a social and moral crisis—the so-called divorce epidemic among the wealthy, and the exclusion from divorce by a rapidly-growing, vocal middle class.<sup>6</sup> And although many aspects of women's disabilities under coverture remained intact in the new court, married women's demands for legal reform and independent legal rights influenced much of the reform rhetoric.<sup>7</sup> Compared to the disabilities of coverture, the new court certainly improved the status of women by occasionally redistributing matrimonial property upon marital termination—periodically assigning custody of the children to the wife, and

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FAMILY LAW 82–83 (5th ed. 1990); MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 149–51 (1989); KATHERINE O'DONOVAN, *FAMILY LAW MATTERS* (1993); Michael Freeman, *Family Values and Family Justice*, 50 *CURRENT LEGAL PROBS.* 313 (1997); Wright, *The Crisis*, *supra* note 3, at 248–67.

6. Ironically, members of Parliament and many reformers viewed the growing numbers of divorce petitions to constitute an “epidemic” in the 1850s, even though the numbers were generally about four per year. We would hardly call such low numbers an epidemic, though the term was appropriate in light of the intense pressure to make divorce available to a wider class of people. What lawmakers and reformers imagined was a flood of divorce applications that threatened to destabilize the central role of marriage in Victorian society. See HORSTMAN, *supra* note 2; STONE, *ROAD TO DIVORCE*, *supra* note 2; Shanley, “*One Must Ride Behind*,” *supra* note 2; see also FIRST REPORT OF THE COMMISSIONERS APPOINTED BY HER MAJESTY TO ENQUIRE INTO THE LAW OF DIVORCE, AND MORE PARTICULARLY INTO THE MODE OF OBTAINING DIVORCES A *VINCULO MATRIMONII* (1853) [hereinafter ROYAL COMMISSION ON DIVORCE], *reprinted in* 18 *BRITISH PARLIAMENTARY PAPERS*, 1 MARRIAGE AND DIVORCE 18 (1969).

7. Although there is great disagreement as to whether the reform was caused primarily by lawyers and lawmakers who were fed up with the burdensome dissolution process, see Probert, *supra* note 2; Woodhouse, *supra* note 2; Wright, *The Crisis*, *supra* note 3, or by the demands of feminist reformers, Shanley, “*One Must Ride Behind*,” *supra* note 2, or by the demands of the increasingly powerful middle class and a belief in contractarian individuality, see DOROTHY M. STETSON, *A WOMAN'S ISSUE: THE POLITICS OF FAMILY LAW REFORM IN ENGLAND* (1982); STONE, *ROAD TO DIVORCE*, *supra* note 2; Lee Holcombe, *Victorian Wives and Property: Reform of the Married Women's Property Law, 1857–1882, in A WIDENING SPHERE: CHANGING ROLES OF VICTORIAN WOMEN* 3–20 (Martha Vicinus ed., 1977), or by the general progressiveness of the late nineteenth century and the war periods, see Wolfram, *supra* note 2, or was a sop to avoid greater reforms in the franchise and married women's property, see CORNISH & CLARK, *supra* note 2; S. MACCOBY, *ENGLISH RADICALISM: 1853–1886* (1938), there is no question that women's demands for greater reform, particularly in married women's property rights, made lawmakers nervous. Much of the debates in Parliament mirrored arguments made by Caroline Norton in her two important pamphlets, *A LETTER TO THE QUEEN ON LORD CHANCELLOR CRANWORTH'S MARRIAGE AND DIVORCE BILL* (1855) [hereinafter NORTON, *LETTER TO THE QUEEN*], and *CAROLINE NORTON'S DEFENSE: ENGLISH LAWS FOR WOMEN IN THE NINETEENTH CENTURY* (Academy Chicago 1982) (1854) [hereinafter NORTON, *CAROLINE NORTON'S DEFENSE*]. See, e.g., BARBARA LEIGH SMITH BODICHON, *A BRIEF SUMMARY, IN PLAIN LANGUAGE, OF THE MOST IMPORTANT LAWS OF ENGLAND CONCERNING WOMEN, TOGETHER WITH A FEW OBSERVATIONS THEREON* (1854); HARRIET TAYLOR MILL, *ENFRANCHISEMENT OF WOMEN* (Virago Press Ltd. 1983) (1851); EMILY NUGENT, *A NARRATIVE OF THE CASE OF THE MARCHIONESS OF WESTMEATH* (1857); [hereinafter NUGENT, *WESTMEATH*]; see also SHANLEY, *FEMINISM*, *supra* note 2 at 22–48; Shanley, “*One Must Ride Behind*,” *supra* note 2.

permitting wives to petition for and receive a full divorce with the right to remarry. Prior to the creation of the new court, only four English wives had received a parliamentary divorce, and only on aggravated grounds of incestuous adultery and bigamous adultery.<sup>8</sup> Cruelty, adultery, bigamy, desertion, drunkenness, and other more traditional grounds had only given wives a right to an ecclesiastical divorce *a mensa et thoro*, which was a separation without the right to remarry.<sup>9</sup>

The creation of the court marked the final shift in the modern secularization of divorce and an acceptance of the appropriateness of judicial oversight in matrimonial affairs.<sup>10</sup> The creation of a civil court to handle these varied aspects of legal divorce was a rejection of ecclesiastical and legislative control over the marital relationship as well as a unification of family property, custody, and marital status. The property rights of the parties would become intertwined with the custody needs of children and an ethic of marital fault. For over a century, marital fault would become the focus, the key to divorce, a determinant in property distributions, and a major factor in determining the best interests of children.<sup>11</sup> The administrative logistics of negotiating the breakdown of the marital relationship would be made simpler and less costly, thus making the remedy available to a wider class of litigants. The new court dealt the final death blow to the ecclesiastical courts and the highly selective and guarded parliamentary divorce. Its rules were the precursor to modern family law and led the way toward the creation of specialized family courts, whose

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8. Georgina Hall Divorce, 1850, 13 & 14 Vict., c. 25 (Eng.); Ann Battersby Divorce, 1840, 3 & 4 Vict., c. 48 (Eng.); Louisa Turton Divorce, 1831, 1 & 2 Will. 4, c. 35 (Eng.); Jane Campbell (Mrs. Addison) Divorce, 1801, 41 Geo. III, c. 102 (Eng.).

9. RICHARD HELMHOLZ, *MARRIAGE LITIGATION IN MEDIEVAL ENGLAND* 100-01 (1974).

10. It was not just any judicial oversight, however, that would be acceptable. The 1857 Act provided that the Court would operate under the aegis of the Lord Chancellor, the presiding judges of the three common law courts, and a Judge Ordinary. Parliament rejected the idea that county court judges or justices of the peace be given the power to grant divorces or try issues of adultery. See CRETNEY & MASSON, *supra* note 5, at 82-84. Granting of divorce was to remain firmly within the highest level royal courts. As one member of Parliament noted, however, it was ironic that it took only one judge to hang a man and three to divorce him. 147 PARL. DEB. (3d ser.) (1857) 758-59. For the most thorough treatise on the law and procedures of the new court, see JOHN FRASER MACQUEEN, *A PRACTICAL TREATISE ON THE LAW OF MARRIAGE, DIVORCE, AND LEGITIMACY, AS ADMINISTERED IN THE DIVORCE COURT AND IN THE HOUSE OF LORDS*, (2d ed. 1860).

11. I have discussed at length the interconnection between marital fault and child custody that arose in the new court, arguing that it frustrated the demands of female reformers who wanted maternal rights independent of marital performance. See Wright, *The Crisis*, *supra* note 3, at 238-48.

procedures and rules were believed to minimize the animosity, destructiveness, and expense of traditional adversarial litigation.<sup>12</sup>

Although some Protestant countries and many states in the United States had experimented with certain aspects of civil divorce, or with breaking down aspects of coverture through married women's property acts before 1857,<sup>13</sup> England was the leader in creating a unified court to handle all matters matrimonial. Unified family courts of today had their origins in the Divorce and Matrimonial Causes Court of 1858. Yet despite the recognition of the court's place in the history of family law and the history of divorce, no historian has thoroughly studied the court's early records. The handful of cases that were eventually reported out of the court,<sup>14</sup> and the Law Commission Report that recommended its creation, have generally been the basis of most scholarship on the incredible changes in family law wrought in the nineteenth century.<sup>15</sup> This lapse is understandable, however, because the records were sealed for 100 years to protect the privacy

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12. See Freeman, *supra* note 5, for a thorough discussion of how well family law and a unified family court have achieved these goals. See also GLENDON, *supra* note 5, at 291–313.

13. New York, for instance, had a married women's property act passed in 1848, and civil divorce was allowed in most New England states since the colonial period. RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* (1988). Massachusetts, as early as 1660 had civil divorce. COLONIAL LAWS OF MASSACHUSETTS: 1660–1672, 143 (Rothman & Co. 1995) (1660). Connecticut did as well by 1677. Record of the General Court, Oct. 18, 1677, *reprinted in* 2 *The Public Records of the Colony of Connecticut* 328 (J. Hammond Trumbull ed., 1852), *available at* <http://www.colonialct.uconn.edu> (last visited Mar. 29, 2004); see also 3 GEORGE E. HOWARD, *HISTORY OF MATRIMONIAL INSTITUTIONS* (Humanities Press, 1964) (1904).

14. There is a four volume set of reports, which reported seventy-nine cases between 1858 and 1860, ninety-seven cases between 1860 and 1862, ninety-one from 1862 to 1864, and sixty-three in 1865, for a total of 330 cases in a period that saw more than 2,000 petitions filed. M.C. MERTTINS SWABEY & THOMAS HUTCHINSON TRISTRAM, *REPORTS OF THE CASES DECIDED IN THE COURT OF PROBATE AND IN THE COURT FOR DIVORCE AND MATRIMONIAL CAUSES* (London: Butterworths) (1863).

15. In the late 1950s, when Griselda Rowntree and Norman Carrier undertook a statistical analysis of divorce in England, they were given permission to view the Divorce and Matrimonial Court's records for only a single year out of the court's first fifty, 1871. Griselda Rowntree & Norman Carrier, *The Resort to Divorce in England and Wales, 1858–1957*, 11 *POPULATION STUD.* 188, 218 (1958). Not surprisingly, they found it very unsatisfying to try to make a comparison between late nineteenth-century divorce and separation actions and early twentieth-century actions when they were given access to only two years' court records. Although civil jurisdiction over divorce was established in England in 1858 through the creation of the new Divorce Court, the thousands of petitions, answers, and affidavits from those cases were sealed until the 1980s. In the meantime, Rowntree and Carrier were able to look to other sources for their study, such as census records and the court dockets, but they were unable to examine the wealth of information available in the actual court papers.

of the litigants. Thus, only recently have these records become available for scholarly analysis. In my own work on the law of domestic relations in eighteenth and nineteenth-century England, I quickly realized the gap that existed in our understanding of the rise of civil divorce and I determined to delve into this wealth of material. This article represents an initial analysis of the first decade of the court's records and is intended to note some initial patterns and make suggestions for further research.

Over 2,500 petitions were filed in the first nine years of the court's existence, yet less than 10% resulted in published case reports. And while the rules of law that emerged from the court are critical in understanding the history of divorce in England, so too are the details we can glean from the thousands of litigants who turned to the court to resolve their domestic problems. In an attempt to get into the lives of the forgotten families whose only memorials are their divorce petitions, I spent time over two summers examining the court files and analyzing them along numerous axes of gender, age, marital faults, and remedies. I examined the petitions, answers, affidavits, and the court's docket for the nine-year period from 1858 to 1866, in an attempt to uncover what I could of the lives of the litigants and the practices of the court in its first nine years.

This article is not exhaustive and I have limited myself to reporting the data in as clear and accessible a manner possible. Many of my conclusions, interpretations, and motives I am forced to leave for another article, as explaining the history of the court and exploring its records has already resulted in a perhaps too-lengthy recitation of the material I uncovered. But to entice the reader to bear with me through the details of the court's first nine years, I can promise a number of surprising conclusions. Although the court was given a relatively weak mandate, some truly modern practices emerged.<sup>16</sup> Joint custody orders for children were not common, but did occur.<sup>17</sup> Child support orders were sometimes made distinct from alimony orders.<sup>18</sup> The court was very good to wives, who had a higher success rate in their divorce and separation actions than husbands, as well as in custody and

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16. See Jacob Goldstein & C. Abraham Fenster, *Anglo-American Criteria for Resolving Child Custody Disputes from the Eighteenth Century to the Present: Reflections on the Role of Socio-Cultural Change*, 19 J. FAM. HIST. 35-39 (1994).

17. See *infra* tbl. 14.

18. See *infra* note 264 and accompanying text; MACQUEEN, *supra* note 10, at 176.

alimony petitions.<sup>19</sup> And the court did permit the filing of a handful of petitions *in forma pauperis* despite the fact that it would be well into the next century before a regularized program of legal aid would make the courts available to needy citizens.<sup>20</sup> The judge of the first four years was not a particularly liberal or activist judge, but he was scrupulous and fair.<sup>21</sup>

The data also revealed a few troubling things. The vast majority of wives left the court with no property and no indication of future financial support even when they were not responsible for the termination of their marriage.<sup>22</sup> Very few wives even asked for alimony or custody of their children. The grounds for marital termination for wives—which consisted of aggravated adultery—led to a depressing litany of violence, adultery, and desertion in the lives of these women. And an alarming number of wives abandoned their suits after filing, putting themselves at physical risk of retaliation by violent husbands and then ultimately failing to receive any kind of protection.<sup>23</sup> At the same time, the high numbers of orders protecting deserted wives' property showed a significant number of women operating in the economic marketplace who had amassed enough wealth to hire an attorney and independently petition the court for redress.

Perhaps the most significant, and absurdly obvious, finding is that husbands and wives were differently situated in their ability to go to the courts to resolve their family disputes and that those differences changed over the age of a marriage. Young wives approached the court under very different circumstances than middle-aged wives or older wives. In fact, the variability among the petitioners as the marriages aged appear to have been more influential than the actual substantive legal rules in determining a petitioner's claims before the court. While these kinds of findings force us to examine the law and society question more closely<sup>24</sup>—

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19. See *infra* tbls. 5, 11, 20.

20. See MACQUEEN, *supra* note 10, at 365; CORNISH & CLARK, *supra* note 2, at 387; CRETNEY & MASSON, *supra* note 5, at 90.

21. See *infra* Section III.

22. See *infra* Sections VI.B.–D. and accompanying text.

23. See *infra* Part V.A. on the greater physical threat women face after filing divorce or separation papers on the grounds of violence or cruelty. See also Rebecca Dobash & Russell Dobash, *Violence Against Women in the Family*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 495, 497 (Sanford N. Katz et al. eds., 2000); Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 43–49 (1991).

24. The law and society question examines whether law is primarily a product of social structures, or social structures are produced by law. Authors have written of early in-



which I cannot do fully in this paper—they once again reinforce the command that legal historians must place their analysis of law within its broad social context. Besides relatively obvious gender disparities that are revealed in these records, there are also very complex age, class, and psychosocial disparities among the hundreds of petitioners and respondents who used the court in its first few years.

In detailing my findings, I leave for another time an analysis of the theoretical underpinnings of the court's exercise of power within the domestic sphere. While recognizing that no history is devoid of subjective expressions of editorial and academic authority, I postpone that discussion to a later time.<sup>25</sup> And though I am troubled with the interjection of state power into the private sphere, I am also mollified by the legal improvements women have experienced in the last century and a half. I am unsure whether the new court improved the status and power of women or relegated them more firmly to a disempowered domestic sphere. But I cannot explore those questions until I know a little more about the court's practices and what I can uncover about the lives and complaints of the parties who sought legal resolution of their domestic disputes. This article, therefore, is one in a much longer series exploring the implications of civil divorce in women's lives and the legal legacy of untying the knot.

## II. WHY THE DIVORCE COURT?

Prior to 1858, a husband seeking a divorce or separation from his wife had to obtain a divorce *a mensa et thoro*<sup>26</sup> in the ecclesiastical courts, receive a damages award from his wife's seducer in a criminal conversation action,<sup>27</sup> then file a private act for divorce

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fluent texts in the law and society movement. See LAWRENCE FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* (1977); JOEL HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

25. See Danaya Wright, *Well-Behaved Women Don't Make History: Rethinking English Family, Law and History* (unpublished manuscript, on file with author).

26. The divorce *a mensa et thoro* was the ecclesiastical courts' version of a judicial separation and was available for a variety of marital offenses, including: adultery; cruelty; desertion; and bigamy. See CRETNEY & MASSON, *supra* note 5, at 82–83; see also STONE, *ROAD TO DIVORCE*, *supra* note 2, at 192–93. The divorce did not allow either party to remarry and was often accompanied by an unenforceable alimony order. See STONE, *ROAD TO DIVORCE*, *supra* note 2, at 192–97.

27. The criminal conversation action was an act for damages against the seducer of a man's wife, and often resulted in awards in excess of £10,000. See STONE, *ROAD TO DIVORCE*, *supra* note 2, at 231–32. It could only be brought against the male seducer of a man's wife, and the wife had no right to intervene in the action because, under coverture,

before both houses of Parliament and receive the royal signature before he could be relieved of the obligation to support his wife and remarry.<sup>28</sup> The cost of a divorce in the early to mid-nineteenth century was more than £1000 and could easily rise to £5000 if the case were contested.<sup>29</sup> A wife, on the other hand, was entitled only to a divorce *a mensa et thoro* from the ecclesiastical court. Any alimony order would be unenforceable without a separate order from King's Bench or Common Pleas and she would most certainly not receive custody of her children despite the father's unfitness unless he posed a danger to life or limb.<sup>30</sup> She could not remarry, and though she might be returned to *feme sole* status for purposes of any after-acquired property, she would lose all right to any property or wages brought to the marriage and any property acquired prior to the separation.<sup>31</sup> Only four women received parliamentary divorces in the 180 years that they were available, on the grounds of incestuous adultery and adultery combined with bigamy.<sup>32</sup>

The double standard was both a legal and a social fact. The law treated adultery by the wife differently than adultery by the husband.<sup>33</sup> Wives who could prove only simple adultery were allowed only a separation permitting them to live apart from the offending spouse, but not to form new marriages, manage their property, or obtain legal rights to their children. Husbands could make a clean break, start a new family, and restructure all their affairs upon a wife's adultery alone. Socially, too, the double standard made it difficult for fallen women to regain their social position or resume their customary friendships.

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she was deemed to have no legal existence. *See id.* at 234. Moreover, she was deemed unable to consent to the seduction. *See id.*; *see also* LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 20–26 (1998); Susan Staves, *Money for Honor: Damages for Criminal Conversation*, 11 *STUD. IN EIGHTEENTH-CENTURY CULTURE* 279, 279–97 (1982).

28. *See* Wolfram, *supra* note 2, at 159.

29. *See* STONE, ROAD TO DIVORCE, *supra* note 2, at 187–90, 355–56.

30. *See* Danaya C. Wright, *DeManneville v. DeManneville: Rethinking the Birth of Custody Law Under Patriarchy*, 17 *LAW & HIST. REV.* 247, 247, 256 (1999) [hereinafter Wright, DeManneville]. The Chancery had established a double standard in child custody cases, giving the children to the mother only in cases in which the father posed a danger to life or limb, but giving the children to third parties who challenged the father's or both parents' fitness upon a showing simply of best interests. *See id.*; *see also* Martha J. Bailey, *England's First Custody of Infants Act*, 20 *QUEEN'S L. J.* 391, 393–401 (1995).

31. *See* STONE, ROAD TO DIVORCE, *supra* note 2, at 193–95.

32. *See* Wolfram, *supra* note 2, at 174–75.

33. *See* STONE, ROAD TO DIVORCE, *supra* note 2, at 193.

Not surprisingly, by the late 1840s, the law of domestic relations, or the law of *baron and feme* as it was called at the time, was facing severe criticism from a variety of sources.<sup>34</sup> The double standard that allowed men a divorce but not women was criticized by many progressives and women's rights advocates as being unfair to the oft-suffering wife.<sup>35</sup> As many as four divorce actions were making their way to Parliament every year in the last decades of its jurisdiction, which many Parliamentarians bemoaned as a divorce epidemic.<sup>36</sup> They wanted divorce to be properly discouraged as a social evil, especially the seduction and ruination of men's families by libertines. Many in the evangelical and temperance movements criticized the ease with which marital termination seemed possible, especially for the wealthy who were seen as having a lax and lascivious moral code.<sup>37</sup> And even conservative lawyers and lawmakers criticized the unwieldy system that had arisen which required multiple lawsuits and perhaps many years before an innocent spouse could get on with his or her life.

In 1850, Parliament established a commission on divorce to examine the problem and make recommendations for reform. In 1853, a lengthy report was published advocating the creation of a civil court to combine the jurisdiction of: the ecclesiastical courts over matrimonial faults; the chancery over custody of children; the royal courts over certain aspects of property; and Parliament over final divorce.<sup>38</sup> The resulting court was tremendously important in the history of family law and the family. In many ways, it helped move married women from the legal non-existence of coverture to the equal parties in a domestic partnership that is envisioned by the law today. The court also redefined nearly the entirety of the common law of domestic relations, much of which

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34. See *id.* at 368.

35. See SHANLEY, *FEMINISM*, *supra* note 2 at 39–44; Ann Summer Holmes, *The Double Standard in the English Divorce Laws, 1857–1923*, 20 LAW & SOC. INQUIRY 601, 612–615 (1995); Probert, *supra* note 2, at 79–83.

36. See *supra* note 6 and accompanying text.

37. For a good summary of the evangelical and temperance attitudes to male sexual license, see PHILLIPS, *supra* note 13, at 419–20; JOHN TOSH, *A MAN'S PLACE: MASCULINITY AND THE MIDDLE-CLASS HOME IN VICTORIAN ENGLAND* (1999); Holmes, *supra* note 35, at 612–15. Mr. Walpole believed the double standard actually reined in male sexual license by preventing them from getting their wives to divorce them simply by committing adultery. 147 PARL. DEB. (3d ser.) (1857) 1282. Men would also marry in order to prostitute their wives and make money on unsuspecting lovers in criminal conversation actions. See LAWRENCE STONE, *THE FAMILY, SEX, AND MARRIAGE: IN ENGLAND 1500–1800*, at 506 (1977) [hereinafter STONE, *THE FAMILY*].

38. See ROYAL COMMISSION ON DIVORCE, *supra* note 6, at 369.

still prevails in Anglo-American law. The court was responsible for making the transition between ecclesiastical and civil control over marriage, and it inadvertently participated in the ever-growing divorce epidemic that social conservatives have been bewailing since the 1860s.

### III. THE NEW COURT'S PROCEDURE AND COMPOSITION

For the first five years a single judge, Sir Cresswell Cresswell, presided over the new court—from 1858 until his untimely death from a carriage accident in 1863.<sup>39</sup> Sir Cresswell was the son of a sailor, growing up off the coast of Northumberland, and after studying law quickly became adept in maritime and admiralty issues.<sup>40</sup> He joined the Northern Circuit under the shadow of Henry Brougham and John Williams, both great legal scholars and avid litigators, and succeeded them to the bar when they became judges.<sup>41</sup> In 1837 he was elected to the House of Commons as Conservative member for Liverpool, which he served until appointed a judgeship in the Court of Common Pleas by Sir Robert Peel in 1843.<sup>42</sup> After fourteen years on the bench, he was appointed Judge Ordinary for the new Divorce and Matrimonial Causes Court.<sup>43</sup> Sir Cresswell had also spent eight years covering the decisions of the Court of Queen's Bench, producing one of the more esteemed reporter series, *Barnewell and Cresswell*.<sup>44</sup> It is ironic that a man whose origins lay in maritime affairs, and whose legal practice was in Queen's Bench and Common Pleas, would be chosen to head the new divorce court, especially since he never married and had no children. Sir Cresswell has been described by commentators, however, as "an able lawyer, a man of the world, and a thorough gentleman."<sup>45</sup> More importantly, he seemed to approach the job with few preconceptions about the legal disabilities of wives under coverture or the perceived societal importance of protecting the institution of marriage at all costs. He appears to have been pragmatic about the odds of reconciliation, and commentators suggest that he approached his new posi-

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39. See EDWARD MANSON, *THE BUILDERS OF OUR LAW DURING THE REIGN OF QUEEN VICTORIA* 82, 85–86 (1895).

40. *Id.* at 82.

41. *Id.*

42. *Id.* at 83.

43. *Id.* at 84.

44. *Id.* at 83.

45. *Id.* at 85.

tion with a profound desire to "uph[o]ld the sanctity of marriage while . . . vindicat[ing] the rights of outraged spouses."<sup>46</sup>

The new court's law and procedure was a combination of rules from the different courts it was replacing. The court was to take over any matrimonial matters currently pending or any to be brought in the future in the ecclesiastical courts.<sup>47</sup> It was to act on the principles of the ecclesiastical courts with regard to marital validity, annulment, and separation.<sup>48</sup> The Judge Ordinary was also to "have the same Powers, Jurisdiction, and Authority as any Judge of any of the said Superior Courts sitting at Nisi Prius."<sup>49</sup> And the rules of evidence used in the royal courts at Westminster were to apply in the new court, not the rules of the ecclesiastical courts.<sup>50</sup> There was to be appeal from decisions of the Judge Ordinary to the full court, and then appeal from the full court to the House of Lords.<sup>51</sup> The appellate panel consisted of Sir Cresswell plus two other judges from either King's Bench, Chancery, the Exchequer, the Court of Probate, or Common Pleas.<sup>52</sup>

The statute nominally abolished the criminal conversation action,<sup>53</sup> but allowed a husband to seek damages against a co-respondent for committing adultery with his wife,<sup>54</sup> and damages were to be determined by a jury under the same grounds, on the same principles, and subject to the same rules as the earlier action for criminal conversation.<sup>55</sup> In a gesture of nominal equality, a wife petitioning for a dissolution was entitled to join her husband's mistress as co-respondent, just as a husband could join his wife's lover as co-respondent.<sup>56</sup>

46. *Id.* at 86.

47. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, §§ III-IV (1857) (Eng.). In fact, the first twenty or so cases in its first month do not appear to have come from new petitions, but were transferred from other courts. See *infra* Part IV.B.

48. 20 & 21 Vict., c. 85, § XXII.

49. *Id.* § XXXVIII.

50. *Id.* § XLVIII.

51. *Id.* §§ LV-LVI.

52. *Id.* § VIII. This was amended in 1859 to include all of the judges of these courts. See An Act to Make Further Provision Concerning the Court for Divorce and Matrimonial Causes, 1859, 22 & 23 Vict., c. 61, § I (Eng.).

53. 20 & 21 Vict., c. 85, § LIX.

54. *Id.* § XXXIII.

55. *Id.* The damages could be applied to the judge "for the Benefit of the Children (if any) of the Marriage, or as a Provision for the Maintenance of the Wife." *Id.*

56. *Id.* § XXVIII. In reviewing the cases, however, I never saw a single case in which a wife did so, even when she named the partner of her husband's adultery in the petition.

Most significantly, Sir Cresswell had the discretion to hear in chambers any case in its entirety, except dissolution or annulment, and he could order that any other matter be heard before the full court.<sup>57</sup> The full court would sit for two or three days at each quarter-session and would hear testimony in dozens of cases at a time. If Sir Cresswell decided to hear the case himself, it would be scheduled at his convenience, usually earlier than those requiring the three-judge panel.<sup>58</sup> Hence, bench trials were usually resolved in less time than those before the full court and at less cost. Divorce and annulment actions had to be heard before the full court—though one member of Parliament did note the irony of requiring three judges to divorce a man and only one to hang him.<sup>59</sup> However, in 1860, the law was amended to allow the Judge Ordinary to hear those suits alone.<sup>60</sup>

Sir Cresswell could also order a case tried to a jury, either a special or a common jury.<sup>61</sup> The special jury would give fact determinations on numerous specific issues, such as whether adultery was proved, cruelty was proved, or the parties had condoned or colluded.<sup>62</sup> The common jury, on the other hand, would simply answer *yea* or *nay* on guilt or innocence of the totality of the alleged marital breach(es).<sup>63</sup> Juries also decided the amount of damages against co-respondents in all of the cases involving damages for alienation of a wife's affections and, because of the cost, were understandably not as prevalent as when an award of damages in criminal conversation was required for a Parliamentary divorce.<sup>64</sup>

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57. *Id.*

58. *Id.*

59. An Act to Amend the Procedure and Powers of the Court for Divorce and Matrimonial Causes, 23 & 24 Vict., c. 144, § I (1860) (Eng.).

60. 23 & 24 Vict., c. 144, § I (Eng.). The law was initially amended in 1859 to allow more judges to hear divorce cases, and to allow the Judge Ordinary to amend property settlements, 22 & 23 Vict., c. 61, §§ I, V (Eng.).

61. There are two kinds of special juries. The first is a jury pool of persons of superior states or special knowledge. The Common Law Procedure Act, 15 & 16 Vict., c. 76, § 108 (1852) (Eng.), provided the procedure for calling for a special jury. Also, a jury could return a special verdict which would be a finding of certain facts that would leave the application of law to the judge. Although the docket referred to the jury as a "special jury," the detailed findings indicate that the latter was the intent and practice of the court. See 2 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH & COMMON Pleas in Personal Actions and Ejectment 841, 928 (London, Butterworth 1828).

62. See 2 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH & COMMON Pleas in Personal Actions and Ejectment 841, 928 (London, Butterworth 1828).

63. *Id.*

64. See 20 & 21 Vict., c. 85, § XXXIII (Eng.); see also LAW REFORM COMM'N OF BRITISH COLUMBIA, REPORT ON INTENTIONAL INTERFERENCE WITH DOMESTIC RELATIONS 8-20

The court sat in London, though the Parliamentary debates showed an awareness of the limitations inherent in such a rule. Lawmakers debated heavily the location of the court and noted that unless these cases could be tried in county courts, the divorce court would never be available to all classes of people.<sup>65</sup> To balance the desire to discourage divorces by making them difficult to obtain, and the desire to make the remedy available to all Englishmen, the 1857 Act provided that the court would sit in London, but that evidence could be taken and factual issues tried at *nisi prius* in the local courts, and the petitioners did not need to appear in court unless explicitly ordered to do so by the judge.<sup>66</sup>

One important question I had was whether a class of professional divorce lawyers would arise to dominate the docket in this new court. To determine that, I noted the attorneys for the parties in every case that I analyzed in full.<sup>67</sup> Notably, there were only a small handful of lawyers, seven, whose names appeared in more than ten cases.<sup>68</sup> Given that there were over a thousand petitions filed in the first three and one-third years, the infrequency of repeat players speaks to the relatively haphazard origins of the new family law.<sup>69</sup> The Act allowed lawyers who practiced in the law courts, the equity courts, and the ecclesiastical courts to practice before the new court. Naturally, it would take time to develop a dedicated bar in matrimonial matters that could coordinate their influence and help establish a new, coherent family law.

Despite being positioned in an established court, Sir Cresswell appears to have been fairly innovative in considering the overall

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(1983) (discussing the decline of criminal conversation and the resulting actions of adultery and enticement); Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 218–23 (1986) (noting the abolition of criminal conversation in 1857).

65. See, e.g., 144 PARL. DEB. (3d ser.) (1857) 1698.

66. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, § XL (1857) (Eng.). *Nisi prius* developed in the 1200s as a way to allow itinerant judges to take certain evidence and hear certain verdicts out in the counties, away from their principal seats at Westminster. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 20–22 (4th ed. 2002).

67. This is the Court Docket database which consists of the court docket for every case in 1858 and for January, April, July, and October of 1859, 1860, and January and April of 1861—twenty-two months. I also perused the cases filed in the other eighteen months of 1859 through April of 1861.

68. They were Gregory, Ibbetson, Johnson, Lewis, Nelson, Pritchards, and Wright.

69. In 1851 there were 2,816 members of the registered bar, and in 1861 there were 3,071 members. DANIEL DUMAN, THE ENGLISH AND COLONIAL BARS IN THE NINETEENTH CENTURY 7, tbl. 1.2 (1983).

equities in the cases before him.<sup>70</sup> But, he was not a radical judge who sought to completely remake the family law of the period. A wife or husband who had been ill-used by her or his spouse could expect to find some relief in Sir Cresswell's court, but great deviation from the pre-existing rules of Queen's Bench, Common Pleas, the Chancery, and the ecclesiastical courts was unlikely. Ironically, in the first few years the court was perhaps at its most innovative, but it eventually developed precedents that had to be followed even when the equities might lean elsewhere, and some of Sir Cresswell's decisions were overturned on appeal, thus slowly tempering any overly hasty assertions of his discretionary powers.<sup>71</sup> What is interesting about studying the records of the first few years of the court's existence is that we can observe the subtle and not-so-subtle influences that helped form the first unified family law in our common law system.

#### IV. MATERIALS AND SCOPE OF THE STUDY: NINE YEARS OF DIVORCE PETITIONS

##### A. *The Petitions*

The divorce court opened its doors in January 1858 to a trickle of cases. In the first month no petitions were filed, though twenty cases were transferred in from other courts. Of the petitions filed between February 1, 1858 and December 31, 1866, I examined every fifth petition—unless it was missing, in which case I would substitute the sixth petition—plus I examined every petition for the nine-year period in which the petitioner's last name began with an A.<sup>72</sup> During that nine-year period, 2,540 petitions were filed and I examined 602, or almost 24%. For that period, the number of petitions filed per month remained relatively steady, between five and six petitions per month that I examined, which

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70. See, e.g., *Spratt v. Spratt*, 164 Eng. Rep. 699 (D. 1858) (noting that the divorce court's power over custody of children was more discretionary than the power of Queen's Bench under habeas corpus); *Curtis v. Curtis*, 164 Eng. Rep. 688, 698–99 (D. 1858) (noting that the divorce court's power was less extensive than the Chancery's with regard to permanent custody orders, but made an interim order of custody to facilitate the parties' seeking a remedy in a different court).

71. See, e.g., *Curtis v. Curtis*, 28 L. J. R. (n.s.) Chanc. 458 (1859) (the *Curtis* case appeal).

72. The petitions were organized alphabetically and chronologically, and the petitions for a certain block of years were organized together, 1858–1866 (sixty-three boxes and 2,540 petitions), 1867–1884 (269 boxes and 10,000 petitions), 1885–1898 (20,045 petitions), 1899–1909 (10,000 petitions).



would average out to between twenty and twenty-five per month filed. There was a gradual decline in petitions after the first two years, with a steep decline in 1866.<sup>73</sup> The petitions were filed by both husbands and wives and could request any of a variety of remedies: divorce; judicial separation; restitution of conjugal rights; annulment; alimony; a declaration of legitimacy; or protection of property. The overwhelming majority of husbands sued their wives for divorce and always for adultery, with a handful of separation, conjugal rights, and annulment actions thrown in. Wives, on the other hand, sued for divorce and judicial separation in more equal numbers, had a significant number of property petitions, and, like husbands, a handful of conjugal rights, annulment, and alimony actions. There were also a few legitimacy petitions.<sup>74</sup> Because the orders protecting property are not actions directly involving marital termination or marital relations, I treated them separately for certain of the analyses. Dropping out the protective orders for property shows that the number of petitions filed for marital termination<sup>75</sup> were more consistent over the nine-year period.<sup>76</sup> For simplicity's sake, I refer to this database as the "Petitions."<sup>77</sup>

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73. Most likely this was not caused by some external factor, but rather indicates a change in the way records were kept that year.

74. Legitimacy petitions were brought by illegitimate children seeking to inherit from their fathers or other paternal relations. The suits claimed their parents were legally married and usually involved marriages performed abroad or marriages between an English citizen and a foreigner. See MACQUEEN, *supra* note 10, at 346-58; 21 & 22 Vict. c. 93, An Act to Enable Persons to Establish Legitimacy & the Validity of Marriages, & the Right to be Deemed Natural-born Subjects (1858).

75. Petitions for remedies based on marital offenses or impediments are divorce, judicial separation, restitution of conjugal rights, and annulment.

76. There were fifty petitions filed just for orders of protection of property by married women who had been deserted. These were disproportionately filed in the first couple of years of the court's existence—sixteen in 1858, five in 1859, three in 1860, five in 1861, three in 1862, five in 1863, three in 1864, three in 1865, and three in 1866.

77. Much of my analysis is necessarily limited by the data available. While it was incredibly rich and substantial, it was also repetitive. There were over sixty boxes of petitions, each wrapped and tied individually with the answer and affidavits. They were arranged alphabetically and chronologically, so there were numerous boxes of petitions by petitioners whose last name began with each letter, and each box held approximately forty petitions. Within the boxes, the petitions were numbered chronologically. The Public Records Office started a new set of boxes after 1866 and began again alphabetically. The petitions were handwritten and covered three to four pages on average. The affidavits generally repeated much of the same information, and the answers were generally shorter. In each petition, the parties would state the date and location of marriage, the number of children, alive and deceased, the current residence of the parties, sometimes the occupations of the parties, the events surrounding the alleged marital offense(s), and the relief requested. Every answer stated a general denial and a majority included excuses or allegations of provocation, condonation, connivance, or independent fault on the part of the petitioner.

**See Table 1 in Appendix:****Total Number of Petitions Filed (1858–1866)****B. *The Docket***

I also reviewed every case recorded in the court docket for the three and one-third years from January 1858 until April 1861.<sup>78</sup> For the first year, 1858, I examined every case filed and took extensive notes on their disposition by the court. For the rest of the period, I only took extensive notes on the cases filed in January, April, July, and October of those years—1859 through April 1861.<sup>79</sup> This database includes detailed information for a total of twenty-two months, and I refer to it as the “Court Docket.” I then took summary notes of limited information for the other months—the remaining eighteen months of the period—and put that information into a database I refer to as “Summary Docket.” In many instances, I analyzed data from both docket databases if I collected the relevant information in both data sets. But for other information, like the names of the attorneys, or dates of filing alimony petitions, I used only the more thorough Court Docket database.<sup>80</sup>

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78. This period was much shorter because the record keeping changed in 1861. For this first period, the court kept its records in seven folio volumes of 350 pages, with each page devoted to a new case. After April 1861 the court shifted to individual records that were kept with the petitions and other case records.

79. I chose those months for no reason except the thought that more actions might have been filed around the quartersession dates when the full court sat, but there was in fact little variation per month in the filing of petitions, though great variation in the times and dates hearings were held and final rules granted.

80. Though I have looked at every case docketed in the three and one-third year period, I do not have detailed information for every case. Thus, for certain issues, I look at just one docket database, and for others, I look at both. Then, wherever possible, I cross reference the docket databases to the petitions database to see how those two compare. In the Court Docket database, I collected the following information: the names of parties; the attorneys; gender of petitioner; the date the petition was filed; the relief requested; whether it was opposed; the date the hearing was set; whether the hearing was before Sir Cresswell himself or the full court; the date of filing alimony petition; date of granting of the alimony petition and the amount ordered; the date a jury trial was held; the jury's verdict; the date of final order; the final outcome; the grounds for the relief; the amount of costs; the party taxed with costs; whether custody was requested and whether it was granted; and any other miscellaneous information that pertained to the information collected. For the Summary Docket database, I omitted all dates except the month of filing the petition, and only collected the following information: the name of parties; whether husband or wife filed the petition; the cause of action; the outcome; the grounds; whether opposed or not; the amount of costs identified; the amount of alimony ordered; whether there was a jury trial and its verdict; whether custody was requested and/or granted; and any other miscellaneous information that seemed relevant.

The docket held some new and some duplicate information from that provided in the petitions. On each page of the docket book, the court clerk had recorded the names of the parties, their attorneys, the date the petition was filed, what relief was requested, and then listed, in order, each pleading as it was filed, noting when the respondent and/or co-respondent appeared, when answers were filed, when alimony petitions were filed, when the court set the cause down for a hearing, the make-up of the court assigned to hear the case, delays and continuances caused by failure to appear, dismissals by consent of the parties, and a brief record of the final outcome. If there was a jury, the docket recorded the jury's verdict, and often the names of the jurors, and then the court would enter a final order.

In many cases, the entries into the docket simply stop, mid-way through the case, without reaching any form of resolution. Some of these occurred early, as when the petition would be entered, and then no further action was taken on the case. Others would proceed even beyond a hearing and then, inexplicably, simply end. If there was no final resolution—neither a grant nor denial of the petition—I noted the case as having been “not continued,” though I did not distinguish between cases not continued after filing the initial petition, and those that proceeded at some length, perhaps through a hearing or two, before it dropped from the record.<sup>81</sup>

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81. There were seven folio volumes of docket books that listed all the filings and all of the court's hearings in each case. Each volume consisted of 350 pages, and each new petition, as it was filed, was given the next blank recto page in the book. As one book filled, the court went to the next book. Each case would then have the front and back side of each page for its record. In three and one-third years, the court went through nearly seven volumes, though many cases extended beyond the two allotted pages and then jump to the next blank page in the next volume. This meant that a lengthy case could be recorded in as many as five or six different volumes. Because cases were docketed as they were filed, they are not alphabetical in the docket. The process was complicated to follow and was most likely unwieldy for the clerk. Because a case could not be tracked easily, often requiring reference to multiple volumes, and changes in court procedure in 1860 led to more space being required, the docket volumes were phased out. The court shifted to require a rule *nisi* followed by three months before the final divorce decree was final which meant there were two lengthy recitations of the petition, the proof, the allegations, and the final decree in the docket. After April 1861, the court shifted to individual pamphlets to record each case. These pamphlets resembled modern-day blue books, with a cover and eight to ten pages of lined paper. After the change, these docket pamphlets would be tied up with the petitions in the petition boxes. Unfortunately, I did not realize that the changed procedure would actually make it harder to look at the docket information, for when I obtained the information from the petitions I looked cursorily at the docket and noted the final outcome, but nothing else. Then when I went back to study the docket in depth, I was only able to look at the seven volumes, and did not have time to go back through the dockets for the remaining six and two-third years that are filed with the petitions. That project re-

The number of cases docketed each year were fairly even, though they too showed a steady decline over the period—373 in 1858, 330 in 1859, 306 in 1860, and 95 in the first four months of 1861.<sup>82</sup> There were a total of 1,144 cases docketed in this period, which shows the court handling 45% of its 2,540 petition caseload in its first three and one-third years.<sup>83</sup>

**See Table 2 in Appendix:**

**Number of Cases Docketed Each Year (1858–1861)**

The court was quite popular in its first few years, handling over 1,000 divorce and judicial separation actions. Considering there were only 379 parliamentary divorces requested in the 188 years between 1670 and the creation of the court in 1858,<sup>84</sup> we can safely conclude that people did flock to the court in unprecedented numbers. This increase is despite Lord Brougham's prediction that there would not "be any very great increase in the number of divorces, although undoubtedly there might be some slight increase when the hindrances which were presented at present to persons of small means who wished to obtain divorces were removed."<sup>85</sup> During the first three and one-third years of the court's existence, 200 divorces were granted to wives, and 278 to husbands. In the previous 188 years, only four wives had received a parliamentary divorce.<sup>86</sup> In terms of sheer numbers, the court clearly made divorce and separation newly available for wives and middle-class husbands, though our understanding of who these litigants were becomes much richer as we break down the cases by factors such as gender, custody, property, and class.

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mains for another year.

82. Separating out the protective property orders results in a leveling out of the numbers of petitions docketed per year—324 in 1858, 305 in 1859, 289 in 1860, and 87 in the first four months of 1861—as we saw with the petitions.

83. Of the 2,540 petitions filed in nine years, 1,144 were docketed in the first three and one-third years. See *infra* tbl. 2. Forty were of an unknown cause of action and therefore could not be identified from the docket alone. See also *infra* tbl. 1.

84. See STONE, ROAD TO DIVORCE, *supra* note 2 at 432, tbl. 10.1.

85. 146 PARL. DEB. (3d ser.) (1857) 207. This was an increase of over 150 times the number of divorce petitions per year from the pre-court era.

86. Compare Wolfram, *supra* note 2, at 174–75, with STONE, ROAD TO DIVORCE *supra* note 2, at 432, tbl. 10.1. Stone identifies only two divorces granted to women, while Wolfram identifies four. Wolfram's data appears more reliable because she gives the cites to each one specifically, and her data corresponds to parliamentary returns. HORSTMAN, *supra* note 2, at 24 (agreeing with Wolfram's statistics); Wolfram, *supra* note 2, at 174–75 nn.82, 84–86.

## V. FINDINGS

### A. *Gender and Marital Termination*

The dual standard by which the law treated marital infidelity is simply one indicator of gender inequality during the Victorian period, though it was perhaps the most profound difference between the men and women who sought termination of their marriages before the new court. The men who petitioned for divorce almost uniformly alleged adultery by their wives and, if they obtained their divorces, were relieved from further support, kept custody of their children, and had the right to remarry. The women who petitioned for a divorce or judicial separation did so on the basis of a variety of claims, including adultery, adultery mixed with cruelty or desertion, bigamy, sodomy, cruelty or desertion alone, incest, or incapacity.<sup>87</sup> Only after a divorce could a husband or wife remarry. The sexual double standard, therefore, that permitted husbands to obtain a divorce simply by showing adultery, but permitted wives to obtain a divorce only by showing aggravated adultery, had significant effects on the ability of wives to remarry. Though the numbers of men and women seeking termination of their marriages were roughly equal—with women filing slightly more petitions—women sought judicial separations, which did not allow remarriage, in nearly half of the termination actions they brought.<sup>88</sup> Thus, husbands obtained divorces, with the right to remarry, nearly twice as often as did wives.

While the data reveals some significant gender differences, it is difficult to determine whether they were merely the result of the different adultery standards, or reflect important gender-based socio-legal norms, behavior, and restraints. The questions are made even more complex because men and women faced different legal obligations regarding support, custody, and property. In analyzing the gender differences presented by this data, I do so with an eye toward discovering under what circumstances women might have opted for a divorce over a judicial separation, what benefits each provided, and the impact, if any, such choices had on other aspects of marital termination, like custody of children and control over marital property. While it is impossible to de-

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87. See An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, § XXVII (1857) (Eng.) (stating the grounds for divorce and judicial separation for women).

88. See *infra* tbl. 5.

termine the lived context in which these petitioners committed adultery—whether there was collusion, connivance, or intolerable home situations—the data does show some patterns for certain classes of women that may reveal deeper social divisions.

In collecting the data, I noted the sex of the petitioners, the cause of action requested, the grounds, the length of the marriage, the number of children, and requests for alimony or custody. Some petitions were very detailed in the information they provided, listing the dates and partners of multiple acts of adultery. Other petitions were very sparing in their descriptions of adultery and cruelty. These were possibly instances of collusive petitions, and I noted them if they seemed unusually short on details.<sup>89</sup> It did appear, however, that the likelihood of seeing extensive details of the marital crimes declined over the nine-year period, which may indicate that collusive divorces increased, or that attorneys realized the court would not demand extensive detail in the petitions, especially if the facts still required proof in hearings or jury trials. Because the grounds for obtaining a divorce were different for husbands and wives, some of the differences in the petitions and outcomes may be simply the result of the different legal rules. But assuming that some of the differences may be indicative of the prevalence of adultery or violence, I have analyzed the petition and docket data along numerous axes of gender, offense, length of time to final order, success rate, class, length of marriage, number of children, and instances of bigamy or desertion.<sup>90</sup>

In the first three and one-third years, 1,005 petitions were docketed, seeking divorce, judicial separation, restitution of conjugal rights, annulment, alimony, and legitimacy.<sup>91</sup> The vast majority of the petitions sought either divorce or judicial separation—957 out of 1,005, or 95%—and were split relatively evenly between wives and husbands; 459 by husbands and 498 by wives, or roughly 46% by husbands and 50% by wives.<sup>92</sup> The other 2%

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89. Unfortunately, the data on court procedure, timing, type of hearings, and incidence of uncontested or default actions must await a different article.

90. It is important to note that some of this data is available only from the petitions, some only from the docket, and some from both. Not all of my axes of analysis are discussed in this article. I have postponed the study of the court's procedure for a later article, though I have done the relevant analysis and collated the data.

91. See *infra* tbl. 3; see also *supra* text accompanying notes 83–84. This number represents all petitions filed during this time, except for the ninety-nine protection of property orders. See *infra* tbl. 2.

92. See *infra* tbl. 3.

were petitions for any of the other four causes of action and 2% were cases in which I was unable to identify the cause of action from the docket and/or petition.<sup>93</sup> The vast majority of the petitions filed by husbands were for divorce, rather than judicial separation (443 divorces to sixteen judicial separations), while the petitions filed by wives were more evenly divided (285 divorces to 213 judicial separations).<sup>94</sup>

### **See Table 3 in Appendix:**

#### **Number of Petitions Filed (1858–1861)**

If we look at the petitions that span the nine-year period, the numbers are similar. Out of 551 petitions—which is a sampling of nearly one in every four petitions filed—the vast majority of petitioners (93.4%) sought either divorce or judicial separation.<sup>95</sup> The split between husbands and wives was also similar—242 petitions by husbands, or 43.9%, and 273 petitions by wives, or 49.5%.<sup>96</sup> And the majority of petitions filed by husbands were for divorce (234 for divorce and only eight for judicial separation), while wives petitioned for divorce and judicial separation at more nearly the same rate (148 for divorce and 125 for judicial separation).<sup>97</sup> In only two years did women file more judicial separation petitions than divorce petitions.<sup>98</sup>

### **See Table 4 in Appendix:**

#### **Number of Petitions Filed Minus Protective Orders (1858–1866)**

While adultery was the most common marital violation in the petitions and docket, there were more charges from husbands of adultery by wives than from wives by husbands at a time when women were supposed to be living a private morality of chastity

93. See *infra* tbl. 2; *supra* text accompanying notes 83–84.

94. See *infra* tbl. 3.

95. See *infra* tbl. 4.

96. See *infra* tbl. 4.

97. See *infra* tbl. 4.

98. See *infra* tbl. 4. Why a wife might choose a judicial separation over a divorce is an interesting inquiry. Besides leaving her fewer options and in a more vulnerable position, the separation would seem to offer little relief for women whose husbands had not deserted them. It was quicker and cheaper to obtain but there is no indication that it offered better support. More importantly, although separated wives could own property as though they were *femes sole*, there were other limitations arising out of coverture that might still pertain. See *infra* discussion and notes 118–23, 132–34 and accompanying text. A formal judicial separation, however, was better than a private separation or an informal separation. See 142 PARL. DEB. (3d ser.) (1856) 408–14 (providing Lord Lyndhurst's critique of the state of a married but separated wife).

and female passivity.<sup>99</sup> Although there were overall more total marital termination suits by wives than by husbands, the fact that virtually all the ones brought by husbands were for their wives' adultery gives us a skewed image of Victorian wives as a rather adulterous lot.<sup>100</sup> But these numbers should not lead us to conclude that women were more adulterous than men. Husbands had more options in dealing with a troublesome spouse than did wives, for they could determine their wives' residency, could commit them in an asylum, lock them in the house, or even desert them if they were not compliant.<sup>101</sup> A few husbands, whose wives did not commit adultery, did obtain judicial separations on the grounds of their wives' cruelty, but these were rare.<sup>102</sup> The scarceness of separation actions by husbands likely indicates men's greater facility in making informal arrangements within difficult marriages that did not involve adultery.

While they had fewer informal options, wives also had greater legal obstacles to overcome in their termination suits. Without an aggravating factor of incest, cruelty, or desertion, or without the adultery, a wife could only bring a judicial separation action.<sup>103</sup> Adding to their difficulties, wives who had allowed their violent

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99. See *infra* tbls. 6, 9, and 10. There was a tremendous amount of literature that contributed to a social discourse of female chastity, modesty, temperance, purity, and passivity. See, e.g., STONE, *THE FAMILY*, *supra* note 37, at 673–77; Thomas DeQuincey, *The Household Wreck*, 43 BLACKWOOD'S EDINBURGH MAG. 1, 5 (1838) (describing the heroine in the following terms: "Every thought of artifice—of practiced effect—or of haughty pretension, fled before the childlike innocence—the sweet feminine timidity—and the more than cherub loveliness of that countenance, which yet in its lineaments was noble, whilst its expression was purely gentle and confiding."); *Female Influence: A Domestic Sketch*, 5 TAIT'S EDINBURGH MAG. 668 (1838); T.H. Lister, *The Rights and Condition of Women*, 73 EDINBURGH REV. 99, 100 (1841) (stating that "the peculiar office of man is to govern and defend society, that of woman is to spread virtue, effection, and gentleness through it."); John Neal, *Men and Women*, 16 BLACKWOOD'S EDINBURGH MAG. 387 (1824); *The "Non-Existence" of Women*, 23 N. BRIT. REV. 536 (1855).

100. See *infra* tbl. 10. The character of the adultery differed by gender, however, as petitions by wives who requested a divorce or judicial separation for adultery charged their husbands with repeated acts of adultery, many of them over a multi-year period, with multiple partners or prostitutes, and a depressing number included an allegation that the husband had given the wife venereal disease. There were very few petitions that alleged just a single act of adultery. Petitions by husbands, on the other hand, usually alleged multiple acts of adultery with a single, named person, and often noted that the wife had deserted her home to live with her new paramour, had borne children by him, or come to the marriage with illegitimate children.

101. BLACKSTONE, *supra* note 1, at \*441–46 (comparing the rights of husbands and wives in English marriage). Because husbands had control over support and domicile, they could force misbehaving wives into mending their ways much easier than wives could influence husbands. See *id.*

102. See *infra* tbl. 10.

103. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, § XVIII (1857) (Eng.).



or adulterous husbands back in the house after a marital infraction would lose their grounds for termination because they would be held to have condoned the misbehavior.<sup>104</sup> Because it was more difficult for women to prove the grounds necessary for a divorce, and because women were encouraged by families to forgive and forget, the defense of condonation was likely to work more harshly in petitions brought by wives than by husbands. Thus, many wives who might have been victims of both adultery and cruelty might only be able to prove one or the other because of strict application of the rules of condonation. The amount of adultery, therefore, is likely to be underrepresented in the data.<sup>105</sup>

Besides examining the gender of the petitioners, we need to compare the number and character of women's divorce actions to their judicial separation actions. Given the legislature's belief that women were too passive to assert their rights in great numbers in a court of law, and the stereotypes of female passivity that filled the literature of the day, the high percentage of divorce actions suggests that women were actually quite interested in clean breaks with the opportunity to remarry.<sup>106</sup> More than half of the

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104. ALBERT GIBSON & ARTHUR WELDON, GIBSON & WELDON'S STUDENT'S PROBATE, DIVORCE AND ADMIRALTY 145-46 (1887); see also STONE, ROAD TO DIVORCE, *supra* note 2, at 206-07. Condonation sometimes operated quite harshly, so that a husband who stayed out most of the night with his mistress, but came home in time to fall asleep for a couple of hours, could plead condonation if his wife did not oust him from the home the moment he stepped over the threshold. GIBSON & WELDON, *supra*, at 145-46. Allowing him to resume habitation, no matter how briefly, was held to be a successful bar to her divorce or judicial separation action. *Id.* Although condonation required proof of a full knowledge of the offense and the deliberate forgiveness of it, Gibson and Weldon note that "the first fact being established, the forgiveness is generally evidenced by a receiving back of the guilty party into cohabitation." *Id.*

105. The effect of this underrepresentation is likely to be significantly higher for wives than for husbands. The expectations in many middle and upper-class circles was that a wife who was going to commit adultery would need to run off with her lover and never return home, adding desertion to the charge as well. See STONE, ROAD TO DIVORCE, *supra* note 2, at 141-43. In many cases, husbands often did not have an opportunity to condone the adultery. Husbands, on the other hand, routinely visited prostitutes or beat their wives with no expectation of deserting their home. Unless a wife had a place to go, she would most likely be forced to remain at home and thus held to have condoned. She would be expected to leave her home and perhaps her children in order to defeat a defense of condonation. While much of this is based on the literature of the period, novels as well as diaries and political tracts, it also corresponds to the claims made in the petitions. Husbands were overwhelmingly more likely to state that their wife had run off a few months earlier with her lover. Wives were more likely to state that their husbands had visited prostitutes or obtained a mistress, but that he returned home periodically to tend to his affairs.

106. The standard history tells us that women really did not want to legally separate from their husbands; instead they wanted their husbands to behave themselves. Consider Elizabeth Packard and Caroline Norton's claims that they did not want to be divorced wives, whom they perceived as forlorn victims of male oppression who existed in a state

women who sought termination of their marriages had the grounds for a full divorce and pursued it despite the higher cost associated with divorce, greater evidentiary challenge, and longer delay.<sup>107</sup> Because the only real difference between divorce and judicial separation was the right to remarry, these numbers are striking in at least two ways. First, the fact that over half of the wives seeking marital termination met the elevated standard of aggravated adultery and were thus deserving of a full divorce goes against the lawmakers' expectations that divorces would be sought only in extremely rare circumstances.<sup>108</sup> Instead of the rare four to five cases per year, nearly one divorce action every four days was filed alleging aggravated adultery.<sup>109</sup> Second, given the social stigma of divorce and the financial independence required of separated women,<sup>110</sup> the fact that women brought more termination actions than men suggests that their married lives were miserable enough to make them willing to take on that challenge. Women who went to court and asserted their legal rights to terminate their marriage did so with more determination and against greater odds than the men who sought out the court's help.

### B. Success Rate

Of the four primary marital termination categories—divorce by husbands and wives and judicial separations by husbands and wives<sup>111</sup>—surprisingly, the highest success rate was for wives in

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outside social and legal legitimacy. Dirk Hartog explains how Elizabeth Packard did not want to be a divorced woman; she wanted to be married to a husband who did his duty and protected his wife. Hendrik Hartog, *Mrs. Packard on Dependency*, 1 YALE J. L. & HUMAN. 79, 96 (1988). Caroline Norton felt the same way, wanting the law to make her husband behave, not grant her the power to leave him. Norton says "[m]asculine superiority is incontestable; and with the superiority should come protection . . . Women . . . have a right—founded on nature, equity, and religion—to the protection of man." NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7, at 165.

107. In the first two years, divorces could be granted only by the full court, which met only quarterly, cost more, and generally took three to four months longer than separation cases heard before Sir Cresswell alone. 20 & 21 Vict., c. 85, § X (Eng.).

108. 146 PARL. DEB. (3d ser.) (1857) 207.

109. See *infra* tbl. 3 showing eighty-seven divorce petitions by wives filed in 1858, seventy-four in 1859, etc.

110. Although entitled to support if she won, only about one in ten divorced wives received a support order, and at least 10% of these required further enforcement orders. See *infra* tbls. 20, 21; see also LAWRENCE STONE, UNCERTAIN UNIONS (1995) [hereinafter STONE, UNCERTAIN UNIONS] (describing the hardships facing women who terminated marriage) and STONE, BROKEN LIVES, *supra* note 2, at 35–40.

111. See An Act to Amend the Law Relating to Divorce and Matrimonial Causes in

divorce, even though it was the most difficult cause of action to prove. At the same time, women's success rate in judicial separations was the lowest, even though it should have been one of the easiest to prove. From the court docket, we see that 278 divorces were granted for husbands, out of 441 filed (63%). For wives, 200 divorces were granted, out of 284 filed (70%). But for judicial separations, husbands were granted theirs 58.8% of the time, while wives were granted theirs only 40% of the time. If judicial separations were easier and cheaper to obtain, one would think that women would get them at a higher rate than divorce if their evidence of marital fault was weak or they had limited financial resources. That wives generally obtained fewer judicial separations than divorces and had a much lower success rate in that action suggests that women sought the greatest relief they could obtain and that at divorce their evidence of fault was quite strong. It also suggests that women's rate of non-continuance was not caused by any overt hostility from the court; rather, that outside influences—either family pressure, finances, or a private settlement—were at work.

**See Table 5 in Appendix:**

**Outcomes of Petitions Filed (Docket: 1858–1861)**

From a purely financial perspective, some of these gender-based distinctions make sense. A husband who obtained a divorce for his wife's adultery would be relieved entirely of supporting her. If he obtained only a judicial separation, he might still have to provide support because she could not remarry and obtain a new husband who would be legally bound to support her. Thus, if his wife committed adultery, a husband had every incentive to obtain a full divorce rather than settle for a judicial separation in order to be entirely free of his dependent wife, and the petitions reflect such incentive (443 divorces to sixteen separations). A wife, on the other hand, who was successful in either her separation or divorce action would be legally entitled to some form of financial support, even if it was not always requested.<sup>112</sup> There would be little property-based incentive to seek divorce over separation, especially since in neither did the court express much concern for wives' property rights.<sup>113</sup> While a divorce might yield a

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England, 20 & 21 Vict., c. 85, § VI (1857) (Eng.).

112. See *infra* Part VII.C. (discussing alimony).

113. By the statute, a wife was entitled to permanent alimony in a separation action, and to a property settlement—a gross sum of money or annual sum of money—or alimony in a case of dissolution. 20 & 21 Vict., c. 85, §§ XVII, XXXII (Eng.). It is not entirely clear

one-time property payment or an annual settlement for a specific monetary amount, which would be enforceable in court,<sup>114</sup> alimony orders and property settlements were granted in fewer than 20% of petitions by wives.<sup>115</sup>

The number of judicial separation petitions filed by wives that were not continued deserves more attention and research. Forty-four percent of judicial separation actions brought by wives were not continued, compared to 17.6% of judicial separation actions brought by husbands that were not continued.<sup>116</sup> There are a number of possible explanations for this. Lawrence Stone believed that wives were most likely to file a separation or divorce petition solely for the purpose of blackmailing husbands into property settlements, alimony, or private separation deeds.<sup>117</sup> If failure to continue prosecuting a suit indicates some ulterior motive, then Stone may be right. However, my analysis reveals that there were a sizable number of petitions filed by wives that were refiled as different causes of action—usually a shift from a judicial separation to a divorce—which may indicate that additional evidence of adultery was obtained after the parties separated.<sup>118</sup> Also, many petitions were refiled presumably after correcting certain

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what the difference was, though two factors made the property settlement less advantageous. Between 1858 and 1860, the court did not have the power to make settlement orders affecting property settled on the parties before their marriage. Thus, the resources which the court had power to settle on the wife were limited. Also, in 1861, Sir Cresswell held that a property settlement should be smaller than alimony in order to dissuade women from seeking dissolution of their marriage. *Fisher v. Fisher*, 2 Sw. & Tr. 410, 413 (1861).

114. While the law provided that husbands who were separated from their wives had to continue to support them, the level of support was left primarily to the discretion of the husband unless permanent alimony was ordered. And although a divorced wife had a right to a specific sum through a property settlement—it would seem that wives would prefer such an outcome—the surprisingly low number of alimony and settlement requests by wives, in addition to the high number of writs of attachment that were necessary to enforce compliance with alimony orders by husbands, calls into question drawing any conclusions about whether divorce or separation was preferred by wives based on the financial benefits of either.

115. For a discussion of property settlements and alimony, see *infra* Parts VII.B. and VII.C. See also *infra* tbl. 21.

116. A small percent—less than 1% over all petitions—were abandoned because of death by one party or the other, which was noted by the court. Certainly, death may have occurred and the court may not have been notified, but we cannot know how often that occurred.

117. STONE, ROAD TO DIVORCE, *supra* note 2, at 183.

118. While few cases involved changing the grounds during the suit, there was a great fear by wives who obtained a judicial separation on the grounds of their husbands' adultery or cruelty, that if they later took up habitation with another man, their husband could return and petition for a full divorce on the grounds of their adultery. This essentially condemned separated wives to celibacy unless they were willing to lose the financial support of their former husbands. See *id.* at 169.

pleading errors or successfully being able to serve notice. Thus, the 44% number may be somewhat high when we take account of refiled petitions. Most likely, the difference indicates a lack of economic means to continue the suit, inexperience by lawyers for wives, the pressure on wives from family to reconcile or not to go public, or the time wives may have required before coming to terms with the permanence of a final break.<sup>119</sup> To the extent women are socialized into negotiating peaceful compromises and solutions to disagreements, the willingness to discontinue a suit may indicate a preference for informal resolutions of marital difficulties.<sup>120</sup> At the same time, filing the petition is often the most emotionally and financially difficult step for a mistreated wife, and can lead to harsh retribution from a violent husband.<sup>121</sup> We should not hastily attribute the 44% of judicial separation actions that were not continued to pecuniary motives of blackmail, especially in light of the danger women face filing the petition and the high success rate women generally experienced in the new court. Without knowing more about their economic means, family pressures to reconcile, the number of private separations that occurred, and the likelihood of obtaining more favorable settlement terms from their "blackmail," I hesitate to attribute the high abandonment rate to any single cause.

Given the relative fluidity of working class society, and the privacy aspirations of the middle class, failure to continue a separation probably indicates that another form of termination occurred, rather than reconciliation.<sup>122</sup> In a few cases, both husband

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119. Hendrik Hartog tells the story of Abigail Bailey, an American wife in the late 1700s, who took a long time coming to accept the fact that she would have to divorce her husband who had sexually abused their eldest daughter. See Hendrik Hartog, *Abigail Bailey's Coverture: Law in a Married Woman's Consciousness*, in LAW IN EVERYDAY LIFE 63 (Austin Sarat & Thomas R. Kearns eds., 1993) [hereinafter Hartog, *Abigail Bailey's Coverture*]. Given the social stigma of divorce, it is not surprising that many wives would not enter into the process quickly or decidedly. *Id.* at 99; see also Hendrik Hartog, *Abigail Bailey's Divorce*, in MAN AND WIFE IN AMERICA 40 (2000) [hereinafter Hartog, *Abigail Bailey's Divorce*]. Caroline Norton also waited many years, listening to her family's pleas for patience, before she permanently left her abusive husband. See NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7, at 31-41; Bailey, *supra* note 30, at 404.

120. Hartog, *Abigail Bailey's Coverture*, *supra* note 119, at 99.

121. Studies suggest that the greatest threat women face from abusive husbands is when they seek to leave the marriage, violence that is often triggered by the service of process on the husband. See Dobash & Dobash, *supra* note 23, at 495-510; Mahoney, *supra* note 23.

122. From evidence in diaries, novels, and biographies, permanent reconciliation seems very rare. On the other hand, a kind of peaceful—or not so peaceful—non-interference may have arisen in many marriages in which each allowed the other to form new relationships or take up new abodes without turning to the law for redress. Caroline and George Norton, George and Emily Westmeath, and Nelly and Aaron Stock all lived separate and apart,

and wife filed petitions and the parties apparently agreed to pursue one, leaving the other to languish, or the court consolidated them and granted one while dismissing the other. Of the twelve cases that involved petitions filed by both spouses, two-thirds (eight) were not continued by the wife, while the husband's suit progressed to a final order of dissolution.<sup>123</sup> Of the petitions for judicial separation by wives that were not continued, roughly 14% involved an allegation of desertion, indicating that informal separation occurred and the wife sought formal resolution of the pre-existing status quo.<sup>124</sup>

One likely form of non-judicial resolution to these abandoned cases would be desertion, usually, by the husbands<sup>125</sup> or, in the middle and upper classes, a private separation agreement negotiated with all the limitations and disadvantages of informal attempts to bargain around coverture.<sup>126</sup> Private separation agreements are harder to account for because the point of these agreements was to renegotiate marital breakdown outside of the courts and the public eye. There are few records on the total number of these agreements that existed. Susan Staves and Lawrence Stone have both examined the private separation agreements and found that they were a favorite of the middle and upper classes who dreaded the gossip and scandal associated with public divorce actions.<sup>127</sup> They also were far more common

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though none could be said to be peaceful with continuing lawsuits, fights over children, and publication of each others' grievances in pamphlets and newspapers. See NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7; 1 NELLY WEETON, MISS WEETON: JOURNAL OF A GOVERNESS (Edward Hall, ed., 1936). See generally NUGENT, WESTMEATH, *supra* note 7. But couples did live separately in novels, particularly in novels dealing with the aristocracy, which often blurred the line between marital separation and each just going about his or her own business. See, e.g., ANNE BRONTE, THE TENANT OF WILDFELL HALL (Ernest Rhys, ed., J.M. Dent & Sons); MARGARET OLIPHANT, THE MARRIAGE OF ELINOR (London, MacMillan 1982) [hereinafter OLIPHANT, MARRIAGE OF ELINOR]; EMMA D.E.N. SOUTHWORTH, ISHMAEL: OR IN THE DEPTHS (New York, A.L. Burt Co. 1826); ANTHONY TROLLOPE, HE KNEW HE WAS RIGHT (New York, Harper & Bros. 1869).

123. Of the twelve cases, eight resulted in the husband obtaining a divorce and the wife's suit being dismissed or not continued; three resulted in the wife's suit being granted and the husband's dismissed or not continued; and one resulted in both petitions being dismissed.

124. See *infra* tbl. 6.

125. A remarkable number of husbands seemed to have participated in the mass emigration to the United States, Australia, and New Zealand during the middle of the century.

126. See Susan Staves, *Separate Maintenance Contracts*, in 11 EIGHTEENTH-CENTURY LIFE 78 (Nov. 1987) [hereinafter Staves, *Separate Maintenance Contracts*]; Tammy Moore, Common Sense and Common Practice, Custody Provisions in Deeds of Separation: England 1705-1873 (2002) (unpublished Master's Thesis, University of New Brunswick) (on file with the author).

127. See Staves, *Separate Maintenance Contracts*, *supra* note 126, at 90; STONE, ROAD

mechanisms for resolving marital disputes in the diaries and novels of the period than court proceedings, which may indicate a general social acceptance of these agreements within the literate classes.<sup>128</sup> Moreover, enough agreements were eventually litigated to suggest that a thriving market existed.<sup>129</sup> But we have no way of knowing what percentage of abandoned separation actions were followed by formal separation agreements.

Failure to continue a private or a legal separation was problematic for both parties, however, and there would have been great incentive to avoid such a fate. Unless they truly reconciled and once more formed a harmonious domestic unit, these couples would remain married, vulnerable to the property claims of the other,<sup>130</sup> while unable to legalize new relationships. Again, how-

TO DIVORCE, *supra* note 2, at 149–82; Moore, *supra* note 126, at 33.

128. Private deeds were used in the cases of George and Caroline Norton, George and Emily Westmeath, and Nelly and Aaron Stock, *supra* note 122. In addition, the following cases dealing with private deeds went to trial: *Hope v. Hope*, 43 Eng. Rep. 534 (1854); *St. John (Lord) v. St. John (Lady)*, 32 Eng. Rep. 1192 (1805); *Swift v. Swift*, 146 Rev. Rep. 524 (1865); and *Vansittart v. Vansittart*, 119 Rev. Rep. 109 (1858). We also see them in novels by Anthony Trollope, Margaret Oliphant, and Elizabeth Gaskell. See *supra* note 122.

129. Lawrence Stone explains that

[b]etween 1790 and 1830, an attempt was made by lords Kenyon and Eldon and others not merely to reduce the scope of private separation deeds, but even to abolish them altogether. However, their efforts generated a backlash. Other conservatives were reluctant to overturn a century of case law, and reformers were anxious to meet a clear public need. As a result, private separation deeds were still flourishing when the new Divorce Court was set up in 1857, and even afterwards they continued to serve a useful purpose. In 1908 it was estimated that there were still 2,000 private separations a year, compared with a mere 100 judicial separations.

STONE, ROAD TO DIVORCE, *supra* note 2, at 181; see also Moore, *supra* note 126.

130. Husbands would have a continuing duty to support their wives and would be liable for their debts; wives would be vulnerable to their husbands' demands for access to any property they had been able to put aside through their labor, or their children's labor. Caroline Norton details the miseries of such women in her book, *ENGLISH LAWS FOR WOMEN*. NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7.

To stand the brunt of a vile and indecent action at law, and afterwards reside apart from her husband for ten, fifteen, twenty years,—with every human circumstance, except death, that can put division between them,—does not affect the legal fiction which assumes that a married couple are *one*. The husband retains all his rights over her and her property. If he please, he can bring an action for restitution of conjugal rights; and he may seize her even by force . . . . He retains the right of bringing an action for divorce . . . . All that belongs to the wife is the husband's—even her clothes and trinkets: that is the law of England. Her earnings are his. The copyrights of [her] works are his, by law.

. . . .

That this is a desperate position for a woman to be in . . . are all incontrovertible truths. But it is also an incontrovertible truth that justice should be made *possible* for her, even in this false position. That, failing her natural protector, the law should have power to protect.

ever, the positions of husbands and wives differed significantly, especially in mobility and opportunity to enter new romantic relationships. In cases of adultery by a wife, she might very often move in with her lover, leaving the husband, with his earning potential, alone and available to form a new relationship and a new family. Even if his suit was not continued, the likelihood that the wife's future debts would be paid by the new lover was high, and the husband could hopefully find a replacement for his wife's services. But the reverse was not true. Most wives were not financially independent, and if their husbands left to take up habitation with a mistress, they could not easily find a replacement without moving out of their communities, possibly committing bigamy, or remaining and committing adultery themselves—thereby becoming vulnerable to a divorce action by their husbands. Because women generally did not have the financial and social independence to form new attachments or relocate, being a married woman without a husband or a formal legal termination meant these women were probably relegated to future celibacy and dependence on their families, as well as continuing legal non-existence under the laws of coverture.<sup>131</sup> And while this may have been a choice for some women who wanted to avoid the publicity at all costs, it is hard to imagine that many women would willingly begin a very difficult and controversial process, file the petition and make a public record, and then discreetly disappear back into obscurity without any legal protection or resolution.<sup>132</sup>

### C. *Marital Faults*

Because husbands sued almost exclusively on the ground of adultery, patterns and differences in marital fault manifest themselves most in the cases brought by wives. Of the grounds for the termination actions brought by wives—adultery, cruelty,

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NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7, at 156–57, 161–62.

131. For women who started businesses, the disabilities of coverture were a real hindrance to their ability to enter into contracts, except perhaps in London which by custom had allowed married women to enter into contracts regarding their separately-owned businesses. See BAKER, *supra* note 66, at 484; Beard v. Webb, 126 Eng. Rep. 1175 (1800); see also NORTON, LETTER TO THE QUEEN, *supra* note 7, at 57–58 (discussing “the Woman's Divorce” as “leave and remain ALONE”).

132. See, e.g., OLIPHANT, MARRIAGE OF ELINOR, *supra* note 122. The married couple separated shortly after the birth of their only son. *Id.* The mother moved to a secluded house and devoted herself to raising her son, forsaking all other romantic relationships herself, just to be away from her husband. *Id.* The husband, on the other hand, frequently had affairs, socialized in all the proper circles in London and Paris, and was not tied down by any expenses from his wife, because she was being supported by her aged mother and her annuity. *Id.*; see also TOSH, *supra* note 37; STONE, BROKEN LIVES, *supra* note 2.



desertion, bigamy, incest, or combinations thereof<sup>133</sup>—which I correlated to success rate, adultery combined with cruelty was the most popular ground—eighty petitions alleged adultery and cruelty with success in forty-eight (60%) over all causes of action—divorce, judicial separation, restitution of conjugal rights, and annulment.<sup>134</sup> Sixty-four of those eighty were in petitions for divorce while only twelve were in petitions for judicial separation.<sup>135</sup> The success rate for the divorce actions alone was 67%.<sup>136</sup> Cruelty alone was the next most popular ground—sixty-one—with success in only seventeen cases (28%).<sup>137</sup> Not surprisingly, most of those were in petitions for judicial separation (fifty-six) and the success rate there was less than 27%.<sup>138</sup> The third most popular combination of grounds was adultery mixed with desertion, which comprised fifty of the petitions and had a success rate of 76%.<sup>139</sup> Most of those were in divorce actions (forty) with a success rate for the divorces of nearly 88%.<sup>140</sup> Such a high success rate for divorces involving desertion would seem rather odd since these were presumably uncontested divorces with many involving husbands who were out of the country and therefore unamenable to service and notice. For those petitions alleging only adultery, thirty out of thirty-five were in judicial separation petitions, and they had a success rate of 43%.<sup>141</sup>

### See Table 6 in Appendix:

#### Grounds for Marital Termination (Wives only)

Not surprisingly, adultery combined with cruelty or desertion was the most frequent grounds for divorce, while adultery or cruelty alone were the most frequent grounds for judicial separa-

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133. I analyzed only the wives for this table because husbands are so consistent. All the divorce petitions allege adultery, though some added desertion as well. But wives had a variety of grounds on which to base their petitions, and we see a notable pattern in the success rate of these.

134. *See infra* tbl. 6. These are for cases in which the wife alleged adultery and cruelty and asked for any of the four major remedies: divorce, judicial separation, restitution of conjugal rights, or annulment.

135. *See infra* tbl. 6.

136. *See infra* tbl. 6. Ironically, one would imagine judicial separation actions alleging adultery and cruelty would have a very high success rate, but in fact, they had a lower success rate than overall actions alleging adultery and cruelty.

137. *See infra* tbl. 6.

138. *See infra* tbl. 6.

139. *See infra* tbl. 6.

140. *See infra* tbl. 6.

141. *See infra* tbl. 6.

tion.<sup>142</sup> Ironically, judicial separation petitions alleging cruelty had only a 27% success rate while judicial separation petitions alleging adultery alone had a 43% success rate, the difference being primarily in the numbers of petitions alleging cruelty that were not continued—63% not continued alleging cruelty, compared to 47% not continued alleging adultery.<sup>143</sup> Was cruelty harder to prove or was the court more sympathetic to women's claims of adultery? Further comparisons need to be done to see if there exists any class-based explanations for this difference.

Obviously, no petition asking for a divorce and alleging adultery would be granted, though oddly two petitions asking for a divorce and alleging cruelty alone were apparently granted.<sup>144</sup> Perhaps most significant is that adultery was at least one ground in 193 petitions, while cruelty was at least one ground in 170 petitions.<sup>145</sup> The only other ground that even begins to approach these two is desertion, which was alleged in ninety-eight petitions.<sup>146</sup> Bigamy was alleged in eight petitions, incest in three, sodomy in three, impotence in two, and ouster in eight.<sup>147</sup> What this tells us about the prevalence of adultery and cruelty in these women's lives is important. Even though adultery with cruelty was the most common grounds alleged for a divorce, and cruelty was the most common ground for a judicial separation, adultery predominated overall in these petitions.<sup>148</sup>

Wives who could allege adultery also were more likely to be successful than wives who alleged cruelty.<sup>149</sup> Oddly, however, adultery by the husband, which was excused and even condoned in much of the literature of the period, was more indicative of a wife's success in a divorce than cruelty, which was universally denounced in that same literature.<sup>150</sup> The prevalence of adultery certainly implies that it was a widespread practice by Victorian husbands who were in marriages that ultimately broke down and

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142. See *infra* tbl. 6.

143. See *infra* tbl. 6.

144. See *infra* tbl. 6. It may have been that the petitions were amended to add a ground and the docket failed to report it.

145. See *infra* tbl. 6.

146. See *infra* tbl. 6.

147. See *infra* tbl. 6.

148. See *infra* tbl. 6.

149. See *infra* tbl. 6. One hundred eighteen petitions were granted to wives claiming adultery out of 193 (61%), while eighty-five petitions were granted to wives claiming cruelty out of 170 (50%).

150. See, e.g., 142 PARL. DEB. (3d ser.) (1856) 406; STONE, ROAD TO DIVORCE, *supra* note 2, at 198–206; *The "Non-Existence" of Women*, *supra* note 99; Lister, *supra* note 99.

it is a requisite to a divorce petition. This does not mean that Victorian husbands were more adulterous than husbands of other periods, but it does suggest that wives who wanted to get a favorable hearing were more likely to do so with an allegation of adultery than of cruelty or desertion.

Perhaps most tragic is the number of women who alleged, as part of both adultery and cruelty, that their husbands had given them venereal disease. Of 551 petitions filed by both husbands and wives, twenty-two wives claimed their husbands gave them venereal disease while only two husbands claimed their wives infected them.<sup>151</sup> This works out to nearly 10% of wives who were infected by their husbands (twenty-two out of 264) while less than 1% of husbands were infected by their wives.<sup>152</sup> To the extent Sir Cresswell was sympathetic to the wife of an adulterous husband, this allegation would seem to be a powerful tool in her arsenal, and in fact twelve of the twenty-two cases alleging venereal disease resulted in granting the wife's petition, while seven were not continued and three were dismissed.<sup>153</sup> However, assuming the allegations were true,<sup>154</sup> one must wonder what happened to the nearly half of these women who were not successful.

Although these numbers cannot tell us how many women faced violence or adultery in the home, they are remarkable for showing that adultery, as a marital fault, received more favorable treatment by the court than cruelty. This makes some sense, as adultery traditionally has been deemed the ultimate violation of the marriage vow.<sup>155</sup> Yet, if the culture of the period supported male sexual freedom and female sexual restraint, we would not expect women's divorce claims to be more successful than men's unless the typical charge of cruelty tipped the scale.<sup>156</sup> But, to the

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151. This is information obtained from the data examined in tbl. 4.

152. See *infra* tbl. 4.

153. This success rate corresponds to the rate at which divorces for adultery and cruelty and judicial separations for adultery were granted. The average length of marriage for these women was twelve years and nearly half, ten, had no children. To the extent that long, childless marriages are more likely to involve adultery, that stereotype is supported by the data, though whether the adultery was motivated by loneliness or by a feeling that she has little to lose cannot be definitively identified here.

154. I am likely to believe the truth of these claims given the embarrassment of confessing such an affliction.

155. 142 PARL. DEB. (3d ser.) (1856) 416; 142 PARL. DEB. (3d ser.) (1856) 1981; BLACKSTONE, *supra* note 1, at \*441.

156. See Shanley, "One Must Ride Behind," *supra* note 2, at 364-67 (discussing the Victorian expectation of female sexual passivity and male sexual license); see also JUDITH WALKOWITZ, PROSTITUTION AND VICTORIAN SOCIETY: WOMEN, CLASS AND THE STATE 70 (1980); Nancy Cott, *Passionlessness: An Interpretation of Victorian Sexual Ideology, 1790-*

extent violence and cruelty were deemed a part of Victorian daily life, we would expect claims of cruelty to be heavily scrutinized before providing the aggravating circumstances necessary for a wife's successful divorce. What the data shows, however, is that a significant number of wives who could only prove cruelty, failed to continue their suits and probably left their homes, emigrated, or moved in with new partners as nonlegal solutions to marital breakdown. And those women who did not have the flexibility or resources to simply leave, petitioned for marital termination from what appeared to be a position of immediate need.<sup>157</sup> Those women with the least resources and the weakest claims received little help from the court and may have often found themselves worse off than before bringing suit because they angered their violent husbands by filing and receiving no legal protection in return.

As part of its attempt to keep an eye on the divorce epidemic, Parliament requested a return in 1859, and again in 1861, detailing the dates of filing of divorce petitions and the dates of the adultery alleged in the petitions.<sup>158</sup> According to that return, 50% of the petitions involved acts of adultery occurring in the two years immediately preceding the filing; another 23% were allegations of adultery spanning longer than two years, but continuing into and culminating in the immediately prior two years.<sup>159</sup> A total of 26% of the cases involved allegations of adultery that had occurred three or more years prior to filing the divorce petition, and 5% of all petitions alleged adultery that had occurred more

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1850, 4 SIGNS 220 (1978); Probert, *supra* note 2, at 76–79.

157. See *infra* tbl. 15; see also *infra* Part VII.A. In contrast, 64% of wives seeking a protective order for property had been deserted for longer than five years. The prevalence of relatively recent cruelty and adultery and older desertion allegations indicates that the majority of wives who sought termination had only temporarily escaped their intolerable home lives. But the minority of couples who complained of old abuses and the majority of wives seeking protective orders were most likely seeking to regularize a new relationship that had come into being after an earlier separation.

158. Parliament was concerned with whether the availability of civil divorce would encourage acts of adultery. Thus, the lawmakers were concerned with determining whether the acts complained of had occurred before or after passage of the law on August 28, 1857. The returns showed that 344 of the cases involved adultery occurring after the law was passed and 437 cases involving prior adultery. See "Returns of the Number of Causes for Dissolutions of Marriages filed in the Registry for Divorce and Matrimonial Causes, the Dates when they were filed, and the Dates when the alleged Acts of Adultery were committed: . . ." dated 6 July 1859, in ROYAL COMMISSION ON DIVORCE, *supra* note 6, at 119–32; "Returns," dated 21 August 1860, *id.* at 167–78; "Returns," dated 31 July 1861, *id.* at 181–200.

159. See *infra* tbl. 7.

than ten years in the past.<sup>160</sup> These numbers indicate that, for nearly three-fourths of the petitioners—both husbands and wives—a relatively recent adulterous event most likely precipitated the lawsuit. With regard to judicial separations, 77% of those alleging adultery involved acts within the previous two years, with 6% alleging acts older than ten years.<sup>161</sup> The fact that most of these petitioners faced relatively recent acts of adultery suggests that these people wanted immediate relief, not a regularization of a past separation, though the latter may be the likely motive in up to 25% of cases.<sup>162</sup>

**See Table 7 in Appendix:**

**Length of Time Between Petition for Divorce and Alleged Act of Adultery (January 1858 to July 1861)**

**See Table 8 in Appendix:**

**Length of Time Between Petition for Judicial Separation and Alleged Act of Adultery (January 1858 to July 1861)**

*D. Marital Fault Over Time*

To uncover a little more about the lives of these women, we need to examine more closely how different marital faults related to the life-course of an average marriage.<sup>163</sup> When we compare the marital faults, causes of action, success rates, and number of children to the age of the marriage, we see different patterns emerge. First, the majority of female petitioners clustered in the middle range of length of marriage—averaging 13.3 years.<sup>164</sup> There were only eight out of 297 wives who had been married over twenty-five years who sought divorce, compared to twenty who sought a judicial separation.<sup>165</sup> On the other end of the scale, twenty-five wives married less than five years sought divorces,

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160. See *infra* tbl. 7.

161. See *infra* tbl. 8.

162. See *infra* tbl. 8.

163. Although my five-year breakdown for marriages does not correlate to more scientific studies of the life-cycle of most marriages, it attempts a rough correspondence. Jack Dominian has put forth a good study analyzing multiple causes of divorce and their effects over time, despite being somewhat dated in its stereotypical examples of male and female assumptions. See Jack Dominian, *Families in Divorce*, in *FAMILIES IN BRITAIN* 263 (Rapaport et. al. eds., 1982).

164. See *infra* tbl. 9.

165. See *infra* tbl. 9.

compared to twenty-five who sought judicial separation.<sup>166</sup> And of those married between five and fifteen years, seventy-seven sought divorce, compared to forty-seven who sought judicial separation.<sup>167</sup> What is most interesting is not the prevalence of divorce in the middle years or the prevalence of judicial separation in the later years of marriage, but the high rate of judicial separation in the youngest marriages—those women we would presume most likely to remarry. The high numbers of judicial separation for all women show that remarriage was not the number one priority for nearly half of these wives.

### See Table 9 in Appendix:

#### Wives: Length of Marriage, Grounds, and Success Rate (1858–1866)

The alleged marital faults also changed as the marriage aged. For women married less than fifteen years, the most common marital fault alleged was adultery combined with cruelty (sixty-eight), and the second most common fault was cruelty alone (forty-six).<sup>168</sup> For women at the later end of their marriages, the most common faults alleged were desertion alone or desertion mixed with adultery or cruelty (ten), followed closely by adultery alone (nine).<sup>169</sup> For women married less than five years, desertion was a ground in only six out of fifty-six petitions (11%).<sup>170</sup> For women married more than thirty years, desertion was a ground in seven out of fourteen petitions (50%).<sup>171</sup> And for women married less than five years, adultery was a ground in at least twenty-five petitions (45%), while for women married more than thirty years adultery was a ground in five petitions (36%).<sup>172</sup> A rough summary shows that most young wives sought divorce or separation on grounds of cruelty; that as the marriages aged, adultery began to predominate; and at the end of marriage, desertion predominated. While not surprising in terms of our modern expectations of the way marriages age,<sup>173</sup> what is important is

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166. See *infra* tbl. 9.

167. See *infra* tbl. 10.

168. See *supra* note 87 and accompanying text for details on marital faults allowed under the statute. See also *infra* tbl. 9.

169. See *infra* tbl. 9. Women married twenty-five years or longer fall into this category.

170. See *infra* tbl. 9.

171. See *infra* tbl. 9.

172. See *infra* tbl. 9.

173. The common myth about the “seven-year itch” supports the idea that spouses are likely to commit adultery in waves, with the majority occurring in the middle stages of

that a substantial minority of cases in all age groups fell outside this pattern. Furthermore, the requirement of aggravated adultery for divorce meant women had to prove two separate marital faults, and it is unclear from the petitions which of the two would be the dominant complaint.<sup>174</sup>

We also see an interesting pattern in the success rate of these women's petitions. For women married less than ten years and more than twenty-five years, more petitions were not continued than were granted.<sup>175</sup> But in the middle range of marriage length, between ten and twenty-five years, the number of petitions granted far exceeded the number not continued—eighty petitions were granted and forty-one were not continued.<sup>176</sup> These patterns suggest that women in the middle of their marriages, between ten and twenty years of marriage, were more likely to request a divorce than a judicial separation, and were most likely to pursue it to a final order—with a 58% success rate.<sup>177</sup> What is surprising, however, is that younger women, who had been married less than five years, did not seek divorce at a greater rate than judicial separation, and they had a lower success rate (43%).<sup>178</sup> And women at the late end of their marriages had the lowest success rate (31%), even though they were most likely to ask only for a judicial separation rather than a divorce.<sup>179</sup>

While the foregoing numbers may not seem particularly unusual or diverse, there were important differences in the types of relief and the success rates for wives at different stages of their marriages. The average number of children, not surprisingly, increased with length of marriage. What is most odd, perhaps, is the high number of separation actions filed by young wives who, one would imagine, would think seriously about remarriage, es-

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marriage. Cruelty and violence, however, do not tend to fit any such pattern. See MARGARET BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 96 (2000).

174. In many petitions by wives, there would be a long list of adultery, followed by a single instance of violence or vice versa. Where they were so obvious, I noted them; but the vast majority listed one or two instances of adultery or cruelty and/or a date of desertion, and it is impossible to tell which action most precipitated the lawsuit.

175. At the earlier end of marriage, fifty-seven petitions were not continued, whereas fifty-two were granted. Conversely, at the later end of marriage, fifteen petitions were not continued, whereas ten were granted. See *infra* tbl. 9.

176. See *infra* tbl. 9.

177. See *infra* tbl. 9.

178. See *infra* tbl. 9.

179. See *infra* tbl. 9.

pecially since nearly half did not have children.<sup>180</sup> Their failure to ask for a divorce may be indicative of not having met the more stringent criteria of aggravated adultery, or of having some aversion to a full divorce. But we cannot assume the same factors influenced the predominance of separations at the later stages of marriage. Young women may have been idealistic and so did not imagine remarriage. Or, they may have been quicker to terminate their marriages on weaker grounds than their older sisters.<sup>181</sup> Neither of these positions explains the separation rate for older marriages, which also had the lowest success rate. These latter are the women we would assume to have a lifetime of marital faults to present to the court and the resources to complete their suits. Yet, their success rate was the lowest of any marital termination action by wives before the court.<sup>182</sup> Women in the middle range of marriage were most likely to request a divorce and most likely to get it; yet, these women also would seem the most vulnerable to social and economic forces. Their parents were likely to be dead or elderly, so they could not go home to parents when their marriages fell apart, as younger wives might.<sup>183</sup> At the same time, they would not have amassed life savings through inheritances or work that would provide them with the financial security to risk life without a male breadwinner, which their older sisters might do. Moreover, they would be likely to have children who would be a financial drain.<sup>184</sup> We can speculate along many lines, but in the end we must realize that each woman brought her own experiences and her own ambitions to the court.

Seeing these very significant differences in the grounds and causes of action for women as their marriages aged raises difficult

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180. *See infra* tbl. 9.

181. In the alternative, they may have been more successful in using termination actions to get their husbands to behave, after which they truly reconciled.

182. Such modern factors as battered women's syndrome may also be a factor, as well as the fact that older women may have achieved a relative stability and independence, and thus rarely chose to upset the status quo.

183. While abused wives could, perhaps, go to the homes of their siblings or parents, long-term living situations with siblings were more difficult than with parents, especially if the parents were aged and needed the assistance of these now-single daughters. These expectations played into the common assumption that the eldest daughter would remain single in order to remain in the parents' home. *See generally* LEONORE DAVIDOFF & CATHERINE HALL, *FAMILY FORTUNES: MEN AND WOMEN OF THE ENGLISH MIDDLE CLASS, 1780-1850*, at 347 (1987); STONE, *THE FAMILY*, *supra* note 37, at 380-86; MARTHA VICINUS, *INDEPENDENT WOMEN: WORK AND COMMUNITY FOR SINGLE WOMEN, 1850-1920*, at 10-45 (1985).

184. Because these were mostly middle-class women, their children were most likely financial drains rather than assets. *See, e.g.*, DAVIDOFF & HALL, *supra* note 183, at 343-48; TOSH, *supra* note 37, at 156.



questions about the effect of the adultery double-standard on different women over time. Were young wives more or less hampered by the requirement of aggravated adultery than older wives? Or, are the patterns more likely caused by psycho-social differences? In 1858, wives married twenty-five to thirty years were of a very different generation than wives married less than five years. Did the older women's lifetime under a regime in which divorce was simply unavailable for women affect their willingness to go to court after 1858? Or, were they the women who fought for equal legal rights? Were the young wives naive and optimistic, or were they the harbingers of an enlightened generation? And were the middle-range wives desperate, pragmatic, resourceful, or exasperated victims of male sexual license and violence?

Breaking the petitions down over time shows how important it is to study legal reform within its social context. The new divorce law, which is easy to criticize from an abstract perspective, and which historians have analyzed with a rather broad brush, may have had very little—or very great—impact on a particular woman's decision to terminate her marriage. Unpacking the relationship between legal constraints and a woman's choice to terminate her marriage must wait, however, for the purposes of this article is to continue to make the questions more complex by further breaking down the data to examine how custody, property, and class also intersect with gender and age.

### E. *Husbands*

Although there are fewer patterns to be discerned with regard to husbands, they did tend to seek termination slightly earlier in their marriages than wives.<sup>185</sup> There were more petitions from husbands married between five and ten years than any other; with men married ten to fifteen years following closely behind.<sup>186</sup> Moreover, husbands married less than five years had the highest number of other causes of action—namely, restitution of conjugal rights and annulments—than any other age group, perhaps indicating an aversion to outright divorce in a relatively young marriage.<sup>187</sup> The highest success rate for husbands' divorces occurred in the twenty-five to thirty year marriage range (70%, which was

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185. See *infra* tbl. 10.

186. See *infra* tbl. 10.

187. See *infra* tbl. 10.

the range with the lowest success rate for women), but there were very few divorces in that category.<sup>188</sup> The next highest success rate corresponds to the range with the highest number of petitions—five to ten years—with a success rate of 68%.<sup>189</sup> As marriages aged, the success rates generally declined, which may be an indication that older men were hesitant to set aside their wives;<sup>190</sup> that older wives were less likely to stray; or that the court would scrutinize carefully a husband's attempt to divorce a wife of many years.<sup>191</sup>

### See Table 10 in Appendix:

#### Husbands, Length of Marriage, Grounds, and Children (1858–1866)

Men in the first five years of marriage appear to have brought more diverse claims, including restitution of conjugal rights, than men married longer, which may indicate they made some attempt to reconcile.<sup>192</sup> But after five years of marriage, they asked almost exclusively for divorce and were successful between 60% and 70% of the time.<sup>193</sup> Although the success rate did not differ greatly between men and women overall, a much higher percentage of women than men did not continue their suits, while men had a great percentage of their suits dismissed by the court.<sup>194</sup> As mentioned above, men's low rate of non-continuance, especially after the first five years, can perhaps be explained by their: greater financial independence; the incentives to get rid of an adulterous wife so as not to have to support her debts; and men's overall greater access to courts and lawyers.

A total of eight husbands filed for judicial separation on the grounds of cruelty, and these cases were roughly as successful as their divorces—five granted, two abandoned, and one dismissed.<sup>195</sup> Husbands also filed six annulment actions and three actions for restitution of conjugal rights; none of the latter were

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188. See *infra* tbl. 10; see also *infra* tbl. 9.

189. See *infra* tbl. 10.

190. Of course, this could be an internalized disinclination or, more likely, a social and quasi-legal norm, the violation of which would call down on the husband's head significant censure.

191. I have heard anecdotal evidence that courts have sometimes limited the ability of older couples to get a divorce if doing so would cause great hardship. Hardship could be understood as the stigma of divorce for an older, traditional woman.

192. See *infra* tbl. 10.

193. See *infra* tbl. 10.

194. See *infra* tbl. 10.

195. See *infra* tbl. 10.

successful.<sup>196</sup> Nearly 10%, or twenty-two, of their divorce actions included desertion as a ground.<sup>197</sup> And a small handful of petitions (five) indicated that a private separation deed preceded the divorce petition. Typically, women who separated and did not remain celibate opened themselves to a divorce suit because the private separation had no legal effect on the status of the marriage, which continued to exist in the eyes of the law. Adultery after the separation could then serve as grounds for a full divorce with a right to discontinue support.

There was also a notable difference in the increase for men and women in filing termination actions between those married less than five years and those married between five and ten years.<sup>198</sup> The numbers of termination petitions nearly doubled for men, but rose only about 15% for women.<sup>199</sup> Men married from five to fifteen years filed nearly 54% of male termination petitions, while women married between five and fifteen years filed only 44% of female termination petitions.<sup>200</sup> What we see, therefore, is a greater rise and fall in petitions by husbands, and a much more gradual curve in petitions by wives.

#### F. *The Meaning of Divorce*

One important question raised by this data is why women sought the more difficult divorce at rates as high or higher than judicial separations. While it would seem logical that if the only difference between the two was that the divorce carried the right to remarry, we might assume the women who had a choice sought divorce because they hoped to remarry. But I do not believe that such a straightforward interpretation can be made. Women who, today, have a very difficult time remarrying—middle-aged women with adolescent children—were the group most likely to choose a divorce over a separation in the mid-nineteenth century.<sup>201</sup> I believe the lack of correlation to alimony and custody shows that

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196. See *infra* tbl. 10.

197. See *infra* tbl. 10.

198. See *infra* tbl. 10; see also *infra* tbl. 9.

199. See *infra* tbl. 10.

200. See *infra* tbl. 10. Ironically, male petitions tend to cluster in seven to ten-year intervals, especially in the first fifteen years, confirming the old adage that marriages go through cycles, though apparently it was the wives with the "seven-year itch," not the husbands.

201. STONE, ROAD TO DIVORCE, *supra* note 2, at 420 (noting that divorced women are three times less likely to remarry than divorced men).

these women were not bringing suit for some pretextual reason. They asked for what they wanted, even if they did not always get it.<sup>202</sup>

Social, rather than legal, reasons may offer some possible explanation for the differences. The older women's disinclination to seek a divorce may be explained by reference to an older set of social norms stemming from an era when divorces were not as readily available.<sup>203</sup> Somewhat younger women, who might have been more accepting of the changing nature of divorce, may have been more likely to seek a full divorce. But that does not explain the disinclination of the youngest wives to seek divorce. To the extent they were caught up in romantic notions of reconciliation or were pressured by families, they may have eschewed the full divorce as overstepping acceptable social norms.<sup>204</sup> These young wives also may have had the least financial resources with which to prosecute a divorce action, and instead opted for an informal separation.<sup>205</sup> Moreover, it does not appear from the data at this point that a judicial separation was a common prelude to divorce, as was customary in some states.<sup>206</sup> While some petitioners filed multiple petitions, they were usually within a short time of each other, and the usual success of the last petition indicated flaws in the pleadings more than an expectation that a separation would precede a divorce.

In many ways, the data raises more questions than it answers. By conceiving of marriage in stages and breaking down the grounds, remedies, and success rate, we see that different women seemed likely to have different goals when they went to court.

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202. The lack of correlation is explained in *infra* notes 272–74 and accompanying text.

203. See Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 665 (2002) ("Until the mid-nineteenth century in England, only an ecclesiastical court could grant a separation from bed and board, and only Parliament could grant a full divorce.").

204. STONE, UNCERTAIN UNIONS, *supra* note 110, at 37 ("The overwhelming ideology of female subordination and inferiority, drilled into every member of the society by clerical sermons, state regulations, marital handbooks, and both elite and popular culture, induced a certain docility in most wives, and thus reduced the tension level of the inevitable power struggle within the household.").

205. See *id.* at 42; see also STONE, ROAD TO DIVORCE, *supra* note 2, at 159 (stating that private separation "was also popular as a very cheap way of terminating all marriages").

206. In New York, for instance, there is technically no such thing as a "no-fault" divorce. Couples must legally separate for one or more years before they are entitled to an automatic default divorce. See N.Y. DOMESTIC RELATIONS LAW § 170 (1990) (listing fault grounds and noting required separation periods); cf. 48 N.Y. JUR. 2D § 2084 (1995) (noting that while New York has not authorized "no-fault divorces," courts granting divorces based on a separation agreement do so on a "nonfault basis").

Women were older or waited longer than men before seeking a divorce,<sup>207</sup> and women's failure to continue a large percentage of their suits suggest that multiple factors influenced or limited their legal options.<sup>208</sup> Young wives who were most likely to have family support networks brought almost as many separation actions as divorces, as did older wives who could live with their children.<sup>209</sup> But the reasons motivating each were most likely to differ. Women who seemed the least likely to have the resources to petition for a divorce actually had the highest rate of divorces with the most success.<sup>210</sup> And women at an early stage of their marriage, who might have thought of remarriage, had a divorce rate and a success rate similar to that of their eldest sisters.<sup>211</sup> Men, on the other hand, brought the majority of their termination actions in mid-life, when they had the most financial flexibility and yet retained significant chances of remarriage.<sup>212</sup> These differences suggest that it was not the legal double-standard, or even the legal rules at all, that most influenced the choices of different groups of women. Numerous other social factors must be examined before we can begin to understand the impact of the new legal rules upon different women's lives.

While these petitions may not show surprising gender-based differences in termination actions and their success rates, they do refute many common stereotypes. The simple fact that women filed more termination petitions than men upsets the common idea that men are less monogamous or committed to marriage than women and that men will change partners more frequently.<sup>213</sup> Many women obviously had enough support or economic resources to at least file a petition when they had reached the end of their rope.<sup>214</sup> Although allegations of adultery do not

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207. See *infra* tbl. 9.

208. See, e.g., STONE, ROAD TO DIVORCE, *supra* note 2, at 322-24 (outlining the procedural requirements of filing a divorce).

209. See *infra* tbl. 9.

210. See *infra* tbl. 9.

211. See *infra* tbl. 9.

212. See *infra* tbl. 10.

213. See *infra* tbl. 3.

214. The rope appears to have been of different length for men and women. Although the data does not distinguish between egregious and trivial, if such exists, cases of adultery and cruelty as between men and women, my own anecdotal notes on the petitions indicate that women cited a greater number of violent and adulterous incidents than men—incidents which may have persisted over many years—while men primarily alleged one or two incidents of adultery followed by immediate desertion. Few men alleged multiple acts of adultery with multiple partners by wives who did not eventually desert them. The causes and effects of these different patterns of adultery and cruelty deserve further re-

constitute proof of adultery, wives appeared to be unfaithful at roughly equal rates to husbands. And despite most respondents either denying the charge of adultery or alleging condonation or connivance, most termination suits based on adultery were ultimately successful.<sup>215</sup> Not surprisingly, men were accused of being cruel or violent significantly more often than women.<sup>216</sup> But for women, allegations of cruelty were necessary for a divorce, and when made outside the context of adultery were not as successful as one would imagine (50% success rate).<sup>217</sup> Given the common assumptions of the time—that violence was limited to lower class families and did not exist in the ranks of the wealthy—one would have expected claims of violence in these predominantly middle- and upper-class families to have triggered more concern by lawyers, critics, and the court.

Much remains to be done with this data. To the extent that gender-based differences in social norms and legal rules influenced behavior of men and women in the mid-nineteenth century—differences that are reflected in these petitions—more research needs to be done. My own initial conclusions are that because men and women began from very different social and legal starting points as they approached marital termination, the data I have collected must be interpreted through a complex and nuanced lens. Unfortunately, much of that work must wait until a later article. At this point, let me fall back on the incredible discrepancy between the cases that appeared before the new court and the predictions of lawmakers that the court would have very little business, especially from female petitioners. That the court broke with expectations is remarkable, and the foregoing data suggests just how remarkable that break was.

## VI. CUSTODY OF CHILDREN

Although I began this research with the goal of uncovering the role of custody in divorce and separation, the frequency of custody

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search.

215. See *infra* tbl. 6.

216. Women accused men of cruelty in 170 out of 291 cases while men accused women of cruelty in only nine out of 250 cases. See *infra* tbl. 6. Of course, men did not need to allege cruelty to get a divorce while women did. See generally STONE, ROAD TO DIVORCE, *supra* note 2, at 142 (discussing the more extensive options available for husbands). Nonetheless, the allegations comport with modern studies of male-induced violence within the family. See Dobash & Dobash, *supra* note 23, at 496–500.

217. See *infra* tbl. 6.

orders, the likelihood of those orders going in favor of the mother, and the total number of cases in which the separating parties had underage children, being able to answer some of the questions merely raised a host of new ones. The questions I most wanted to answer were: how many mothers with underage children at home obtained an order of custody as part of their divorce or separation?; how many simply retained the children *de facto* because the husband had deserted them or did not want custody?; and how many actually lost custody or access to their children through their husbands' actions or the court's orders? I also wanted to explore the extent to which women's decisions about divorces, separations, or other remedies for marital breakdown may have been driven by custody concerns.<sup>218</sup> Not surprisingly, I cannot answer these questions definitively, though the material I collected does show some important patterns.

In the first nine years, there were sixty-two requests for custody out of 525 marital termination petitions (fifty-five requests by wives, seven requests by husbands).<sup>219</sup> These are requests that appeared at the initial stage of the case, in the first pleading. Such requests occurred in less than 12% of cases.<sup>220</sup> Once again, because the law was not evenly applied and fathers had the right to custody unless they forfeited it, the burden would be on mothers to defeat the paternal presumption.<sup>221</sup> So considering only the petitions for divorce and judicial separation brought by wives who had surviving children (161), the fifty-five custody petitions appear proportionately more numerous (34%).<sup>222</sup> Of the eighteen custody requests that resulted in an order for custody, sixteen

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218. To some extent the discussion of custody should precede the discussion on the sexual double standard, but there are also reasons why the gender material should come first. Since I cannot present it all simultaneously, I chose the gender material to precede custody, but I am very aware that custody issues may have driven many of these women's decisions.

219. See *infra* tbl. 11. These marital termination actions are divorces, judicial separations, and annulments.

220. See generally *infra* tbl. 11.

221. STONE, UNCERTAIN UNIONS, *supra* note 110, at 37-38, 425-27; see also Wright, *The Crisis*, *supra* note 3.

222. See *infra* tbl. 11. Today, the number is 100% of those marriages with minor children because the courts require that a formal custody arrangement be made. Within those divorces involving minor children, mothers request custody in close to 90% of cases, and they receive custody in roughly 90% of the cases in which they request it. SUSAN MAIDMENT, CHILD CUSTODY AND DIVORCE: THE LAW IN SOCIAL CONTEXT 61-66 (1984). Although those numbers may have changed somewhat in the last decade, it is important to note that courts will not order a dissolution of the marriage without insuring that some provision is made for the minor children. See also Freeman, *supra* note 5, at 441-70 (discussing the progress made with regard to children's rights in the twentieth century).

were granted for the mother, one was granted for the father, and one father received access.<sup>223</sup> Mothers were granted custody at roughly twice the rate of fathers—sixteen out of fifty-five and one out of seven requests, respectively.<sup>224</sup> However, because the law granted absolute custody to husbands whose wives committed adultery,<sup>225</sup> we can assume that the fathers also received custody in the three additional cases in which they were successful in obtaining divorces. Only one father was actually denied his custody petition, while no mothers were.<sup>226</sup> However, because fathers were legally entitled to custody unless an order was made for the mother,<sup>227</sup> we can assume that in many of the thirty-nine cases in which the mother petitioned for custody and no order was given, she did not obtain legal custody of the children.<sup>228</sup> Moreover, a wife's success in the divorce or separation action did not guarantee her an order of custody, though failure to defend a suit brought by her husband was a guarantee that she would not receive custody. And for the fathers whose cases were not continued, three, they would not lose legal custody unless their petition was denied, which it was in one case.<sup>229</sup>

### See Table 11 in Appendix:

#### Requests for Custody in Petitions (1858–1866)

Failure to receive a custody order seems not to have been an indication that the court would deny it were it asked to rule on the issue. Because requests for custody in the petitions were mere requests in the initial pleadings—like the request for “such other and further relief as the court thinks appropriate”—these initial requests did not fare well unless further steps were taken by the wife's lawyer to raise the issue before the court. Some women may not have pursued their initial requests further because they may have retained physical custody upon informal separation or

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223. See *infra* tbl. 11. Since the father got access in one case, the mother presumably retained custody, though the court did not make a distinct order for the mother in that case. The result gave wives legal rights to custody in seventeen cases.

224. See *infra* tbl. 11.

225. See Arlene Browand Huber, *Children at Risk in the Politics of Child Custody Suits: Acknowledging Their Needs for Nature*, 32 J. FAM. L. 33, 38 (1994) (describing one scheme where a mother convicted of adultery was prevented from taking custody of child).

226. See *infra* tbl. 11.

227. See STONE, UNCERTAIN UNIONS, *supra* note 110, at 38.

228. She might have had de facto custody or she might have lost custody to the father after having had it. There is no way to tell what happened post-termination.

229. See *infra* tbl. 11. See MACQUEEN, *supra* note 10, at 156 (stating that the father's rights continue until terminated by court order).



they may not have faced opposition from their husbands. Presumably, when the dispute escalated and custody became a contested issue, further steps would be taken by the parties, and the judge would be forced to make a ruling if he were to rule in the wife's favor. He could deny an order or simply neglect to make one, if he were ruling in the husband's favor.

Practice manuals of the period reiterated the rule that fathers had the *prima facie* right to custody of their children and therefore did not need to request it. One manual went so far as to point out that "indeed, it is better [for the father not to ask for custody], because then he is not hampered should he wish to take the children out of the jurisdiction of the Court."<sup>230</sup> Once a parent requested an order of custody, the children became subject to the jurisdiction of the court and certain actions would require judicial approval even subsequent to the termination.<sup>231</sup>

It is difficult to talk about success rate because the playing field did not begin at a level place. In all seven petitions by fathers for custody, they were also the petitioners for divorce.<sup>232</sup> Their request for custody occurred most likely because the mother had physical custody at the time of the petition. But four of those seven divorce petitions were granted,<sup>233</sup> thus carrying automatic custody and giving the father the unilateral right to remove the children from all access to their mother.<sup>234</sup> One custody petition by the father was denied in a divorce suit he brought but did not continue.<sup>235</sup> It seems likely that the petition for custody was used to threaten the wife regarding property or to justify removal of the children since the divorce petition was later not continued. In the other two cases in which the father's divorce was not continued, we do not know if he ever successfully obtained custody through informal means.

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230. WILLIAM LATEY & GEORGE BROWNE, *LAW AND PRACTICE IN DIVORCE AND MATRIMONIAL CAUSES* 422 (1873).

231. See *MACQUEEN*, *supra* note 10, at 167; see also *DeManneville v. De Manneville*, 10 Ves 51 (1804); *Hope v. Hope*, 8 DeG. M. & G. 731 (1857) (cases in which the court limited the power of the parties to remove the children to other jurisdictions).

232. See *infra* tbl. 11.

233. See *infra* tbl. 14.

234. The bar for adulterous mothers was not lifted until the Guardianship of Infants Act, 49 & 50 Vict., c. 27, § 5 (1886) (Eng.), though it was not until 1948 that an adulterous mother was actually considered not "unfit." Custody, however, still likely remained with the father. See *Allen v. Allen*, 2 All E.R. 413, 413 (C.A. 1948); *MAIDMENT*, *supra* note 222 at 126-31.

235. See *infra* tbl. 14.

Of the sixteen custody petitions granted to mothers, ten were in divorce actions brought by wives that were granted, five were in judicial separation actions brought by the wife that were granted, and one was in a judicial separation action that was not continued. For wives as well as husbands, a custody order was closely tied to success in the termination action.<sup>236</sup> No mother who asked for custody in an answer to her husband's petition for divorce received custody (zero out of four).<sup>237</sup> In one case, a mother asked for custody in a divorce action that she did not continue, and the court ordered the child be given to the father's mother.<sup>238</sup> Wives asked for custody fifty-five times—fifty-one in cases brought by themselves—thirty-two of which the divorce or separation was granted, and they received an order of custody in only fifteen of those.<sup>239</sup> Of the thirty-two marital actions that were granted, an additional six included a claim of desertion, which may mean that an additional six wives received de facto custody of their children. Thus, only twenty-one out of fifty-five petitions by mothers likely resulted in de jure or de facto custody for the mother.

But why did the eleven women who were successful in their divorce or separation, who asked for custody, and who had not been deserted, not receive it? Perhaps they had de facto custody and their husbands did not challenge them. Or, when they asked for custody, they simply did not follow through on the request because they did not believe they would get it. Besides the infrequency of custody orders, the petitions reveal that very few women even asked for custody in their petitions (34% of those bringing suit who had children who had asked for it), and even fewer actually received a custody order (10% or sixteen out of 161).<sup>240</sup> And while the number of custody petitions by mothers increased per year throughout the nine year period, the number of petitions granted declined relative to the requests.<sup>241</sup>

Whether these numbers indicate that significant numbers of mothers obtained de facto custody through desertion or private agreement is impossible to say. Certainly there were novels of the

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236. See *infra* tbl. 11.

237. An interim order was made placing the child with the father's mother in *Boynton v. Boynton*, 2 Sw. & Tr. 275 (1861), but custody was eventually given to the mother.

238. See *infra* tbl. 14.

239. See *infra* tbl. 11.

240. See *infra* tbl. 11.

241. See *infra* tbl. 11.

period depicting deserted families, as well as wives who left abusive husbands and took their children with them.<sup>242</sup> A few of the published cases also involved mothers who took the children when they left their husbands, though none received a custody order allowing them to retain the children.<sup>243</sup> But the scarceness of these sources and the outrage that they generated among conservative and not-so-conservative social critics suggest that, however widespread the practice, maternal kidnapping was soundly discouraged.<sup>244</sup>

The demographics of the petitioners for custody are interesting. One would have expected that mothers petitioning for custody would most likely have had children under age seven who required close supervision, and consequently would not have been married for very long. A prototypical case was the *DeManneville*<sup>245</sup> case in 1804—the first interspousal custody dispute—in which the infant child was snatched from its mother's breast by the father, after a marriage of only a few months.<sup>246</sup> The new mother, wandering forlorn with her newborn child back to her parents and old friendships would seem most sympathetic to the new court in 1858, even though it did not work for Mrs. DeManneville in 1804.<sup>247</sup> Such a scenario conformed to the cult of true motherhood that was prevalent during this period, and provided the mother the best possibility of starting over again after a short and bitter marriage.<sup>248</sup> The other compelling petitioner would be the long-suffering wife whose wanton and abusive husband had finally forced her to leave him, taking their large brood of chil-

242. Ann Bronte's *Tenant of Wildfell Hall* is a good example. See BRONTE, *supra* note 122; see also OLIPHANT, *MARRIAGE OF ELINOR*, *supra* note 122; MARGARET OLIPHANT, *SIR ROBERT'S FORTUNE* (Harper & Bros. 1894) (1891) (hereinafter OLIPHANT, *SIR ROBERT'S FORTUNE*); TROLLOPE, *supra* note 122.

243. In fact, a wife's absconding overseas with the children was likely to guarantee that the husband would receive the custody order. See *Greenhill v. Greenhill*, 163 Eng. Rep. 162, 162-64 (D. 1836); and *Hope v. Hope*, 43 Eng. Rep. 534, 540-41 (Ch. 1857).

244. The critics screamed at the unnaturalness of the Bronte novel wife who would violate patriarchal authority so blatantly. See Wright, *The Crisis*, *supra* note 3 at 245-46.

245. *DeManneville v. DeManneville*, 32 Eng. Rep. 762 (Ch. 1804).

246. *Id.* at 763.

247. *See id.*

248. The cult of true motherhood posited that mothers provided undying and absolute devotion and love to their children—children whose careful nurturance was their mothers' highest calling. See *id.*; see also BRONTE, *supra* note 122 (depicting a story of a young wife who remarries after the death of her first husband, but does so much more reluctantly and wisely). Other novels of the period depicted young, disillusioned wives who had to choose between their husbands and their children. See, e.g., MARY WOLLSTONECRAFT GODWIN, *MARIA: OR THE WRONGS OF WOMAN* (1799), TROLLOPE, *supra* note 122; OLIPHANT, *MARRIAGE OF ELINOR*, *supra* note 122, OLIPHANT, *SIR ROBERT'S FORTUNE*, *supra* note 242.

dren with her as she struck out on her own in late middle-age.<sup>249</sup> Despite the visual effect of such dramatic scenes, the numbers belie both myths, for most female petitioners had only one or two children (thirty-six out of sixty-two petitioners), and the largest category of petitioners had been married from five to fifteen years (thirty-eight).<sup>250</sup> Contrary to our modern assumptions and legal preference for the tender years doctrine—which states that mothers of infants would be given a preference in custody decisions, while school-age children would likely to go to their fathers—the numbers show that most of the children going to mothers were likely to have been aged seven or older at the time of the divorce.<sup>251</sup> Only eight of the petitions for custody came from mothers who had been married less than five years, though they had the highest success rate, receiving nearly a third of all custody orders.<sup>252</sup>

**See Table 12 in Appendix:**

**Custody Petitions by Length of Marriage  
(1858–1866)**

**See Table 13 in Appendix**

**Petitions by Number of Children (1858–1866)**

Although Tables 12 and 13 suggest that most wives had one or two children and were married five to fifteen years, at least a third of the mothers requesting custody did not fit this profile.

249. Hendrik Hartog's analysis of Abigail Bailey's life fits this model well. Abigail left her husband of twenty-five years, taking her eleven children with her. See HARTOG, *Abigail Bailey's Divorce*, *supra* note 119, at 40–62. Of course, striking out on her own could just as easily mean summoning the courage and wherewithal to oust an abusive or violent husband. The key is a wife's mental acceptance that she alone will be responsible for raising the children. See SOUTHWORTH, *supra* note 122 (concurring about a young lawyer whose first case is of a mother who has supported her children on her own while deserted by the father, but is afraid he will return and claim her property and her children). Ironically, in the Southworth novel, set in Washington, D.C., our young lawyer is successful at pleading the tender years doctrine and the equity of abused motherhood—arguments that notably failed in England. Cf. Wright, *The Crisis*, *supra* note 3, at 191.

250. See *infra* tbl. 12–13. These numbers include the custody petitions by husbands, which make somewhat more sense, as fathers were likely to get custody of older children. This was especially true for sons, who could work in the family business or were educated outside the home.

251. See Amy B. Levin, Comment, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?*, 47 UCLA L. REV. 813, 821–22 (2000).

252. See *infra* tbl. 12. The tender years doctrine did not become a legally acknowledged factor until the last two decades of the nineteenth century. See GIBSON & WELDON, *supra* note 104, at 168–69; see also Goldstein & Fenster, *supra* note 16, at 39 (acknowledging a parliamentary law giving mothers custody of children under seven years of age).

Fourteen wives had been married longer than fifteen years before seeking termination, and four received an order of custody even though courts traditionally allowed children fourteen and over to choose which parent with whom to live.<sup>253</sup> These families are numerous enough to warrant further research.

Looking at custody through the docket sheds an entirely different light on the custody situation. The docket database shows only the custody petitions that resulted in a final order in its first three and one-third years.<sup>254</sup> Notably, proportionally fewer custody petitions were granted in the first three years than in later years.<sup>255</sup> Of the sixty-three rulings on custody in the docket, Sir Cresswell granted mothers forty-six custody orders, three access orders, denied custody in five cases and ordered joint custody in three cases.<sup>256</sup> He granted five custody orders for fathers and denied one.<sup>257</sup> We cannot compare the success rate of custody requests in the docket with that of the petitions, however, because the docket identifies only those cases in which an order of custody was granted or denied by the judge, not cases in which custody was asked for and the judge did not act on the request and no mention was made of the request in the docket.

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253. MACQUEEN, *supra* note 10 at 176–177; *Marsh v. Marsh*, 16 Eng. Rep. 744 (1858); *Hyde v. Hyde*, 38 L.J.P.M & A 150 (1859).

254. The procedures on custody were somewhat in flux at this time, and my data is necessarily imprecise to some extent here. Because a petitioner might request custody in her divorce petition and the court might never address the issue at all, a note of the request would come up in the petitions database while there would be no mention of it in the docket. On the flip side, a petition for custody might have been filed after the initial dissolution petition, and it would not show up in the petitions database, however, it would be indicated in the docket if it were ruled on. Thus, it is difficult to overlay the docket database on the first third of the petitions database. This is partly because the docket database reflects every case docketed and the petitions only reflect one in five, but also because some information may be present in one and not in the other. The timing of the requests will have an impact on which database will reflect it.

255. *See infra* tbl. 11; *infra* tbl. 14. Of the 1,045 petitions docketed during that time, only sixty-three custody requests were ruled on—6.6% of the total divorce and judicial separation petitions docketed compared to 12% of petitions asking for custody—though it is impossible to tell from the docket how many requests were made in the initial petition and how many in later pleadings.

256. *See infra* tbl. 14. Many contemporary family law scholars believe joint custody is a fairly new invention, but these cases show it was not. *See also* HENRY JAMES, WHAT MAISIE KNEW (1897) (centering around a little girl whose father and mother each had custody for six months at a time). The brilliance of James's novel is that after the parents fought bitterly for custody, over time each grew tired of the child, and she was eventually raised by an old nanny.

257. *See infra* tbl. 14. Again, this difference makes sense because the docket would only reflect those custody petitions on which the court ruled, not requests for custody embedded in other petitions—like the petition for a divorce or judicial separation.

**See Table 14 in Appendix:****Requests for Custody in Docket (1858–1866)**

Although the success rate seems high in the docket compared to the petitions, it is important to understand the limits of the two databases. The petitions were the initial pleadings in which many women requested custody, as well as their divorce or termination. Then the docket, which lists only final orders that emerged from the court, would indicate those requests that were successful. All records falling between the filing of the petition and the final order have been destroyed. It is not surprising, therefore, that many more requests appear in the petitions than resulted in final orders—indicating an artificially low success rate—and that looking only at the docket where final custody orders are shown, portrays an artificially high success rate. If we try to correlate the numbers of custody requests and their success rate as derived from the nine years of petitions with the custody orders and their success rate from the three and one-third years of the docket, we find that the gap between petitions and final orders grew rather than receded.<sup>258</sup> Fewer than half of the mothers who requested custody in their initial divorce or separation petitions received it, yet many more women received a custody order from the court than requested it in their petitions.<sup>259</sup> Extrapolating the numbers to correlate with the different sets of data in the petitions and docket suggests that roughly one-half of all wives asking for custody did so in their initial petition, and the other half did so through a supplemental pleading.<sup>260</sup> But the success rate suggests that roughly half of the wives who asked for custody in their petition did not follow up on the request or were ignored by the court. The other half did have their petitions addressed by the court, as did those thirty or so wives who added a request for custody after the petition was filed. The majority of those later requests were successful.

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258. *See infra* tbl. 14.

259. *See infra* tbl. 14.

260. *See infra* tbl. 14. If wives requested custody in fifty-five petitions during the nine years, we could extrapolate that trend over the 2,540 petitions filed during this period to deduce that there would be roughly 233 requests for custody. *See infra* tbl. 14. Forty-five percent of those were handled in the first three and one-third years, which would lead us to expect a total of 105 petitions in the docket period requesting custody. Allowing for the increase in the number of custody petitions over the nine-year period, probably a little less than eighty would be more realistic. Given a success rate of 29%, we would expect to find twenty-three to thirty orders for custody in the docket period. In fact, there were fifty-five requests, a little over half the number expected (fifty-five rather than 105) and forty-five orders, nearly one and one-half the number expected (forty-five rather than thirty).

What these numbers tell us about the frequency of custody disputes is important. If we look only at the cases brought by wives, in which there were likely to be underage children in the home, less than 35% included a request for custody.<sup>261</sup> But of fifty-five requests for custody in the petitions, only sixteen were granted. Yet, significantly more custody orders were actually made—forty-five in the docket period out of an expected twenty-eight—<sup>262</sup> indicating that another 50% of wives requested custody in a supplemental pleading that was not preserved in the records. Simply asking for custody in the petition was unlikely to be enough; further follow-up seemed necessary and, if done, was likely to be successful.

Although these numbers seem small, as many as 30% of wives with underage children requested custody, the most difficult question is whether these numbers are, under the circumstances, unusually high, unusually low, or about what one would expect. It would probably be unrealistic to expect mothers to petition for custody of their children in all, or even a majority of cases, when a mere two years earlier they had virtually no legal rights to their children whatsoever.<sup>263</sup> Moreover, for another fourteen years married wives would have no legal rights to their own separate property from which they could support their minor children,<sup>264</sup> and their likelihood of receiving alimony or maintenance was quite low.<sup>265</sup> Thus, 30% of mothers requesting custody may be quite significant.

Perhaps the only thing we can be certain of at this point is that custody was not considered or granted casually or automatically by the court. A simple request in the petition was unlikely to be successful, though with adequate follow-up, a specific request, or some indication of continuing interest, such a request would be

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261. See *infra* tbl. 14.

262. See *infra* tbl. 14. The difference is due to the fact that the petitions, answers, and docket are the only surviving records of these cases. Thus, although many women asked for custody in their petitions and did not receive it, many more who did receive a custody order in the docket must have requested it in a supplemental petition, or perhaps even orally during a hearing. See also MACQUEEN, *supra* note 10, at 167 (discussing the court's jurisdiction to act on its own discretion with regard to making custody orders, or waiting until the parties petition for a decision).

263. See *supra* note 230 and accompanying text.

264. MACQUEEN, *supra* note 10, at 176 (discussing the court's power to order child support). The Married Woman's Property Act would not be passed until 1870, and would be amended in 1882. See Holcombe, *supra* note 7; SHANLEY, FEMINISM, *supra* note 2. See also *infra* notes 329–32 and accompanying text.

265. See *infra* note 412 and accompanying text.

moderately successful. We can, however, speculate about the external factors that might influence a mother's request for custody at this time. We can assume that custody was likely to be a priority in cases where the children had property, so as to become a legal agent to manage the property on their behalf.<sup>266</sup> For so many of the families of relatively high income, property belonging to children might drive the need for a custody order. For the majority of children not in the upper classes, however, lack of property would not correlate to lack of desire for custody. Lack of property in wives may have restrained some mothers who knew their income would decrease dramatically upon divorce, such that they did not seek custody of children they felt they could not support. Moreover, many wives may not have had the financial means to pursue a custody order, assuming legal fees would be higher if additional pleadings were necessary. But of the mothers who did pursue both custody and alimony, the alimony received placed them in the lower half of the socioeconomic class of all women who received alimony, so there is some indication that it was the poorer women who sought custody.<sup>267</sup>

On the other hand, in many of the divorce and separation petitions brought by wives, desertion was one of the grounds offered by the petitioner.<sup>268</sup> Of the 297 marital termination petitions brought by wives in the nine-year period, ninety-four included a claim of desertion.<sup>269</sup> Nearly 32% of wives, therefore, claimed desertion by their husbands, and sixteen of the fifty-five requests for custody were by wives who had claimed desertion.<sup>270</sup> Though it is certainly not true that every husband who deserted his wife

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266. At this time, custody rights often brought with them rights over property owned by the child. This is a vestige of the old socage guardianship which usually allowed the child and his property to become the wards of the closest relative who could not inherit from him. See John Seymour, *Parens Patriae and Wardship Powers: Their Nature and Origins*, 14 OXFORD J. LEGAL STUD. 159, 160–88 (1994); Wright, DeManneville, *supra* note 30, at 265–72.

267. Of the sixty-three cases docketed in which custody orders of some sort were made by Sir Cresswell, alimony was awarded in only twenty-two, with an average award of £77. This average was less than the overall average of alimony awards, so we cannot say that wives in the upper classes were more likely to request custody than wives in the lower classes. In fact, of those wives receiving alimony, those receiving custody as well were more often in the lower half than in the upper half. For further discussion of alimony, see *infra* Part VII.C.

268. Desertion combined with adultery or bigamy was grounds for divorce, and desertion alone was grounds for a judicial separation. An Act to Amend the Law Relating to Divorce and Matrimonial Cases in England, 20 & 21 Vict., c. 85, §§ XVI, XXVII (1857) (Eng.).

269. See *infra* tbl. 14. There were 551 petitions filed, 297 by wives and 254 by husbands, of which ninety-four by wives and twenty-six by husbands included desertion.

270. See *infra* tbls. 6, 11, 14.



also left the children with her, it can be assumed that where desertion truly occurred, custody was not likely to be a contested issue, and the parties believed a legal order would not be necessary.<sup>271</sup>

Finally, twenty-two out of the 153 cases in which alimony was requested also included a request for custody.<sup>272</sup> This is roughly the same percentage overall for custody requests in the court docket, indicating that there was no higher correlation between alimony and custody petitions, or that women who asked for one were more likely to ask for the other. Thus, custody was not requested in greater percentages when alimony was requested or was not used to increase alimony. Yet, 60% of likely cases by wives, in which the husband had not deserted and there were children present, did not include a request for custody. This makes the petitions for custody that were filed appear to be relatively unusual in number, though quite usual in demographics. That is, they do not appear with greater frequency in certain types of cases and I can only conclude that custody simply was not an issue that most people looked to the court to resolve. This is not to say that many mothers and fathers did not fight over custody of their children. In fact, many did.<sup>273</sup> But the lack of correlation of custody petitions to property, tender age of the children, length of marriage and even desertion show that custody was an important yet not all-consuming issue before the court in its early years.

Moreover, in the court docket, there were fewer than ten cases in which the court entered a separate custody order after a separate hearing.<sup>274</sup> To the court, therefore, custody orders were most often integrated into the marital termination action, and were not separately contested issues.

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271. There is some overlap of the numbers here. This statistic comes to life when we consider the case of Abigail Bailey. See HARTOG, *Abigail Bailey's Divorce*, *supra* note 119. Abigail Bailey's husband, Asa, had sexually assaulted their daughter, and when she finally developed the strength to oust him from the home, he took the three eldest sons of their eleven children. *Id.* at 46-62.

272. These numbers are just for the full court docket, not the summary docket.

273. See e.g., *Duggan v. Duggan*, 38 L.J.P.M.&A. 159 (1860); *Suggate v. Suggate*, 164 Eng. Rep. 830, 831 (1859); *Hyde v. Hyde*, 38 L.J.P.M.&A. 150 (1859); *Marsh v. Marsh*, 164 Eng. Rep. 744, 744 (1858); *Spratt v. Spratt*, 164 Eng. Rep. 699, 699 (1858); *Curtis v. Curtis*, 164 Eng. Rep. 688, 688 (1858); see also NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7; NUGENT, WESTMEATH, *supra* note 7.

274. Derived from source records.

It is notable that the custody petitions increased over the years, from an average of 5.6 per year in the first three years, to an average of nine per year in the last three years.<sup>275</sup> While custody requests nearly doubled, the total number of petitions filed decreased over the period, indicating that proportionately more wives were adding a claim for custody to their termination petitions. When we look at the case law coming out of the court during its first decade, we can see why. The court readily adopted a rule tying custody to marital fault; thus, the spouse at fault for the break-up would most likely lose custody.<sup>276</sup> In the late 1860s, the appellate court reversed this rule, going back to the stricter paternal forfeiture rule which gave fathers a near absolute right to custody unless they forfeited it through physical endangerment.<sup>277</sup> But for the period covered by the petitions, it would appear that word was slowly getting around that innocent wives might receive an order of custody if they asked for it.

The infrequency of the custody petitions can be explained both in terms of a disincentive caused by a negative legal climate—mothers had been consistently losing custody petitions for decades—and their lack of correlation to other issues, like property, desertion, or number of children. There were clearly about 30% of mothers who felt that a custody petition was necessary, but 70% did not.<sup>278</sup> Those latter families are still a mystery as to whether they came up with amicable custody arrangements, one party simply did not want to contest the other's *de facto* custody, or the children were old enough to express their own wishes, which were respected. But of the cases in which custody was requested—the overwhelming number were by wives<sup>279</sup>—they did not correlate to alimony requests, and of petitions filed with alimony requests, the income level of the majority of parties who fought over their children would appear to be solidly middle class.<sup>280</sup> These wives were older and had been married for over ten years and they

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275. See *infra* tbl. 11.

276. *Martin v. Martin*, 29 L.J.P.M.&A. 106 (1860); Wright, *The Crisis*, *supra* note 3, at 250.

277. See, e.g., *Curtis*, 164 Eng. Rep. at 688.

278. See *supra* notes 263–65 and accompanying text.

279. See *infra* tbl. 11.

280. Compare *tbl. 14*, with *tbl. 23*. One custody petition was by a person who received alimony of only £5, one at £16, six were between £30 and £50, six were between £50 and £100, and one was at £400. Thus, the majority were between £30 and £100.

fought most over one or two children—a demographic that also correlates with an urban, middle-class population.<sup>281</sup>

## VII. PROPERTY

There were three principal ways in which the new court's powers over property could affect married and divorced wives. First were protective orders for property that would prevent husbands from claiming their wives' wages, earnings, and savings by giving a wife *feme sole* status if he had deserted her.<sup>282</sup> Second were property settlements that were ordered as part of the divorce or judicial separation.<sup>283</sup> Some of these occurred as a way to dispose of damages awards from co-respondents in divorce suits by husbands against adulterous wives. Others occurred as simple property settlements in suits by wives against husbands. Third were alimony orders.<sup>284</sup> Some historians have claimed that wives filed divorce and separation petitions primarily in order to get an award of alimony.<sup>285</sup> But the infrequency of alimony awards calls into question this suggestion. Moreover, the large minority of alimony petitions by wives who were respondents reveals that alimony petitions were very often used by husbands to complicate suits by husbands for divorce, rather than to permanently settle the property relationships of the couple post-separation. Yet the different types of property orders do tell us certain things about the economic resources of the petitioners, their property needs, and their strategic uses of property-based petitions and pleadings.

The most common complaints about women's inability to control property centered around their incapacities during marriage, their inability to keep separate inheritances out of their husbands' hands, and their lack of control over their own wages and debts.<sup>286</sup> The new court did nothing to rectify this imbalance.

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281. See Gail Savage, *The Operation of the 1857 Divorce Act, 1860–1910*, 16 J. SOC. HIST. 103, 106–07 (1983) (comparing the class of the petitioners with the relevant census dates).

282. See An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, § XXI (1857) (Eng.).

283. See *id.* §§ XXV, XXVI, XXXIII.

284. See *id.* § XXXII.

285. See *id.*; STONE, ROAD TO DIVORCE, *supra* note 2 at 183.

286. See Holcombe, *supra* note 7, at 48–87; NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7, at 152–61; SHANLEY, FEMINISM, *supra* note 2, at 29–35. Shanley, "One Must Ride Behind," *supra* note 2, at 356; see generally AMY LOUISE ERICKSON, WOMEN AND PROPERTY IN EARLY MODERN ENGLAND (1995).

However, it did have the power to order protective orders for those wives who had been deserted. Such an order would prevent an errant husband from returning and invading his wife's savings, personal property, or claiming her wages. These property orders were routinely granted and comprised a significant percentage of the court's docket in the first few years. To the extent that critics objected to husbands who returned and raided their wives' savings, the main focus of their criticism was on protecting wives who worked, not wives who were wealthy enough to have family support or savings that allowed them to remain in the domestic sphere.<sup>287</sup> Although the court did not grant a judicial separation or divorce in these cases, and therefore their order potentially affected the property rights of women during coverture, the order was granted only if the wife had proved desertion for at least two years.<sup>288</sup> Since desertion was sufficient grounds for a judicial separation, we must wonder why a wife would seek only the protective order and not a judicial separation as well, especially since a judicial separation would return a wife to *feme sole* status for property purposes. Conversely, if a judicial separation had no other legal effect than to return a wife to *feme sole* status with regard to her property, we must ask why any wife would pursue the time-consuming and expensive separation over the simpler property order.<sup>289</sup>

### A. Protective Property Orders

Women who had been deserted by their husbands—who feared that they might return and take possession of whatever property they had accumulated—could petition the court for a protective order declaring that any property they acquired after a certain date would be held in their own name as if they were *femes sole*.<sup>290</sup> Protective orders for property provided a way for married

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287. See Holcombe, *supra* note 7, at 237–38 (focusing more on protecting the earnings of working-class women than the inheritances of upper-class women because the latter had equitable remedies in the Chancery); SHANLEY, *FEMINISM*, *supra* note 2, at 49–78.

288. 20 & 21 Vict., c. 85, § XXI (Eng.). More than 75%, however, proved desertion for three years or more. See *infra* tbl. 18.

289. I suggest later that this is possibly because judicial separations were more difficult to obtain and more time-consuming. That suggestion is not entirely satisfactory, however, when the number of property orders declined, indicating either that the order did not adequately serve womens' needs, or they found alternative mechanisms to resolve their property issues.

290. This is analogous to the clock stopping on modern notions of marital or community property after separation.

women to protect their wages, their debts, their contracts, and their personal property. Protective orders seem to have been used primarily by women who worked, had small businesses, or who were active participants in the market economy.<sup>291</sup> For those reformers who complained about married women's inability to control the property they brought to the marriage, even their clothes and personal accessories, the reform gave no relief. The protective order would be back-dated only to the date when the husband had been gone for two years. All property acquired before that time was unaffected, including property brought to the marriage or acquired by a wife's labor before the desertion.<sup>292</sup>

Despite the property order's limitations, a significant number of the court's petitions in the first years were for property orders, and a disproportionate number of the property petitions were filed in the first year.<sup>293</sup> In 1858, property orders represented 16% of the total number of petitions filed, while in 1865, property orders represented only 6% of the total number of petitions filed.<sup>294</sup> Although the property petitions give relatively little demographic information about the petitioner, the average length of marriage for women who filed for these protective orders was 16.6 years—slightly longer than the majority of women filing for marital termination.<sup>295</sup> Of all fifty property petitions examined for the nine-year period, 72% were granted, 24% were not continued, and 4% were rejected.<sup>296</sup> The majority of these petitions were summarily granted, as the only proof necessary was proof of desertion.<sup>297</sup> When these petitions were rejected, the grounds tended to be failure to prove desertion because the husband had entered an appearance and answered the petition with a denial.<sup>298</sup>

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291. For a thorough study of working-class Victorian women, see KARL ITTMAN, *WORK, GENDER AND FAMILY IN VICTORIAN ENGLAND* (1995).

292. Such property, under coverture, belonged entirely to husbands. Also, property relations of upper and middle class families that were the result of extensive estate planning were most likely unaffected.

293. 16% of the petitions filed in the first year were for property orders, and 32% of the total property orders in the docket occurred in the first year. *See infra* tbl. 1, 2; *infra* tbl. 15.

294. *See infra* tbl. 15.

295. *See infra* tbl. 15.

296. *See infra* tbl. 15.

297. This is a remarkably high success rate which can be explained by the relatively *pro forma* nature of the action.

298. It also appeared that some women, who wanted a divorce and could not get it because they had difficulty serving notice on their husbands, would instead resort to a property order and an allegation of desertion to prevent their husbands returning from abroad and reclaiming their conjugal rights. To some extent some working-class women may have

**See Table 15 in Appendix:**

**Success Rate for Petitioners Who Filed for  
Protective Orders**

In looking only at the court docket, we see the number of total property orders requested during that time and their success rate. I reviewed sixty-six in full and thirty-three in summary form totaling ninety-nine.<sup>299</sup> Almost twice as many were filed in 1858 as in 1859 (forty-nine in 1858 and twenty-five in 1859) and then the numbers fell even more thereafter, with only seventeen in 1860 and eight in the first third of 1861.<sup>300</sup> During this period, the court granted eighty-one of the petitions, rejected thirteen, and five were not continued.<sup>301</sup> This was the highest success rate for any cause of action before the court.<sup>302</sup> Moreover, of the sixty-six petitions reviewed in full, the length of time between filing the petition and the court granting an order was less than one week in nearly half the cases, and less than two weeks in 65% of the cases.<sup>303</sup> No petition took longer than seven weeks for a final order.<sup>304</sup>

**See Table 16 in Appendix:**

**Length of Time to Grant or Deny Protective Order  
(1858–1861)**

The high success rate and summary process suggest that the court was favorably disposed to protect the property of wives who had been deserted. And lawmakers seemed virtually unconcerned with effects of property orders on family stability. While building roadblocks to *de jure* divorce, the statute showed very little concern for the *de facto* separations that would be legitimized with the property order.<sup>305</sup> At the same time, the property order may

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used the property order to enable them to operate as *femes sole* in the marketplace and thus appear unmarried, opening up the possibility of a second, bigamous marriage. *But see* GEORGE K. BEHLMER, *FRIENDS OF THE FAMILY: THE ENGLISH HOME AND ITS GUARDIANS, 1850–1940*, at 199–200 (1998) (discussing the working-class women who misunderstood the function of the protective order and saw it as a weapon to prevent physical abuse).

299. *See infra* tbl. 15.

300. *See infra* tbl. 15.

301. *See infra* tbl. 15.

302. Wives who petitioned for and received a divorce had the next highest success rate at 70%. *See infra* tbl. 5.

303. *See infra* tbl. 16.

304. This is in contrast to the petitions for divorce and judicial separation which generally took a minimum of a year to resolve, even when entirely unopposed.

305. *See* An Act to Amend the Law Relating to Divorce and Matrimonial Cases in England, 20 & 21 Vict., ch. 85, § XXI (1857) (Eng.).

have been viewed as the only way to stabilize property relations during a period of high desertion and emigration in an increasingly mobile population.

Comparing the docket to the petitions shows that the success rate of 81% in the first three and one-third years dropped to only 72% over the nine-year period,<sup>306</sup> while the number of petitions that were rejected or dismissed also fell, from 13% in the earlier period to only 4% over the longer period.<sup>307</sup> At the same time, the average length of marriage declined from twenty-four and a half years in the first year to fourteen years in the last year.<sup>308</sup> Not surprisingly, the high success rate and long marriage age indicates that the earliest petitioners for a protective property order were middle-aged to elderly women who had been deserted for many years and had meanwhile established stable businesses or had amassed significant savings to afford the legal expense. By the end of the period, from 1862 until 1866, the typical petitioner more closely resembled the class of wives petitioning for termination; they were ten years younger and did not continue their cases roughly 30% of the time.<sup>309</sup> This dramatic change suggests that the women in these later petitions may have had less property, a more difficult time showing desertion, or perhaps were less successful because they were using the property order for more strategic reasons than their predecessors.<sup>310</sup>

Although the total number of petitions declined, the number of petitions that were not continued increased sharply over the nine-year period, and this is troubling.<sup>311</sup> The 5% rate for not continuing their cases in the earlier period more than quadrupled over the nine-year period to 24%.<sup>312</sup> As discussed earlier, an increase

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306. See *infra* tbl. 15.

307. See *infra* tbl. 15.

308. See *infra* tbl. 15.

309. See *infra* tbl. 15.

310. George Howard credits the decline in property orders to the 1870 and 1882 Married Women's Property Acts, but he fails to note the tremendous decline that occurred before 1870. See 2 HOWARD, *supra* note 13, at 116–17. He does note, however, that the property order was of little use to poor women because it did not relieve them from cohabitation, permit them to pledge their husbands' credit for necessities, or compel their husbands to pay alimony. See *id.* Real relief in cases of desertion did not come for these wives until 1886, when maintenance orders could be made by justices of the peace or stipendiary magistrates. See An Act to Amend the Law Relating to the Maintenance of Married Women Who Shall Have Been Deserted by Their Husbands, 49 & 50 Vict., c 52 (1886) (Eng.).

311. See *infra* tbl. 15.

312. See *infra* tbl. 15. Because of overlap in the two databases, the decline in total numbers of petitions filed, as well as the corresponding decline in the success rate would

in the number of petitions not continued is problematic as it either indicates the petitioner lacked the economic means to continue, stopped the suit because she felt she would lose, or reached an informal resolution.<sup>313</sup> The first and second indications are the most problematic, yet also the most likely because there would be no informal resolution that could otherwise protect the wife's property.

The decline in property orders generally may indicate that many women, who would have settled for a property order in the first couple of years, determined that a separation or divorce would be more beneficial in the later years and therefore chose that route. But the decline may also indicate an overall dissatisfaction with the remedy, especially since it would not protect any property acquired prior to the date of desertion. The dramatic rise in property petitions that were not continued corresponded to an overall increase in abandoned petitions throughout all causes of action and may be less cause of concern than those petitions that might invoke violent retribution on petitioning wives.<sup>314</sup> But they do show that even for women who had been deserted by their husbands, the legal rewards of going to court were not automatic. If these women discontinued their suits because they lacked economic resources or could not prove desertion, they would be left in a very vulnerable position indeed.

One explanation for the decline in the total number of property petitions filed is that, in the first three years of the court's existence, many women who were seeking protective orders had been deserted many years earlier, and when the opportunity finally became available, they rushed to take advantage of it. As the court took care of the backlog, women filed for orders less often, and only as they became necessary. This is borne out by the decline in the average length of the marriage for each of the petitions filed during the nine-year period.<sup>315</sup> The average length was significantly longer in the first three years than in the latter six

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seem to be even more pronounced. Moreover, death would be less likely to influence these cases as many women had no idea of the whereabouts of their husbands and whether they were even still alive.

313. For a discussion of noncontinuance and its probable indications, see *supra* notes 114–19 and accompanying text.

314. See *infra* tbls. 5, 15. Of course, the failure to prove desertion may mean that their husbands were hanging around and thus could return to vent their frustrations in violent ways—or, as women obviously feared, lay claim to their property or earnings. MACQUEEN, *supra* note 10, at 380–81 (discussing the reappearance of deserting husbands who then lay claim to the earnings and savings of their wives).

315. See *infra* tbl. 17.



years, and the average length of marriage stayed between twelve and fifteen years for the latter six years.<sup>316</sup> This decline and then leveling off suggests that in the first three years, protective order petitions were filed by many women who probably would have filed earlier—as much as ten years earlier—had the remedy been available. But once the majority of those backlogged situations were remedied, the court's docket leveled out to relatively few cases each year, which were handled when the need arose.

**See Table 17 in Appendix:**

**Property Petitions by Length of Marriage**

This conclusion is also supported by parliamentary returns comparing the date of desertion with the date of filing for a protective order.<sup>317</sup> As seen below, 37% of petitioners in the first three and one-half years had been deserted for longer than ten years, and an additional 27% had been deserted between five and ten years.<sup>318</sup> Less than one-quarter (23%) had been recently deserted.<sup>319</sup>

**See Table 18 in Appendix:**

**Length of Time Between Petition for Property  
Protection and Desertion (January 1858 to July 1861)**

Although the average length of marriage for women filing for protective orders roughly corresponded to the wives who filed the most marital termination actions, the majority were either relatively young wives (five to ten years). These groups did not have the highest success rate in their divorce and judicial separation actions and may have found a property order to be easier to obtain.<sup>320</sup> This can be read in two ways. We can view the property petitions as informal, inexpensive judicial separations and thus consider these with the petitions seeking marital termination. Doing so would show that wives filed significantly over half of all actions in the court, and did so because their marriages had been dysfunctional for at least five years. Or, we can keep the property petitions separate from the termination actions and view them, perhaps, as a third option for working-class wives to protect

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316. See *infra* tbl. 17.

317. See *Returns Relating to Divorce and Matrimonial Causes* (July 30, 1861), in 3 MARRIAGE AND DIVORCE 193-94 of BRITISH PARLIAMENTARY PAPERS (1971) [hereinafter *Returns*].

318. See *infra* tbl. 18.

319. See *infra* tbl. 18.

320. See *infra* tbls. 9, 17.

themselves and their children primarily from the property aspects of coverture. Keeping them separate helps distinguish between termination actions and property actions in order to more finely analyze the different effects the court's actions had on marital termination. I think we need to do both, understanding that the court's actions had different effects on marital status and property, and yet, that status and property were interconnected for many of these female petitioners.

The protective orders also are important for showing that over 15% of all cases brought by women before the court in the first three and one-third years were petitions by women who had amassed enough property to need protection, and who were apparently active in the economic market.<sup>321</sup> A protective order would protect a married woman's wages and her accumulated wealth from errant husbands. Without wealth or wages, she would not need such an order. But while 15% seems small, it is in fact quite large when we consider that these women were entitled to at least a judicial separation that would have accomplished the same goal and given them public recognition of their status as single women. So why would 15% of wives who could get a judicial separation seek only a protective order? One logical explanation is that the lower cost and the shorter time-delay were more attractive for a protective order than a judicial separation.<sup>322</sup> A deserted wife could get a cheap and "quickie divorce" by obtaining a protective order that would allow her to appear in the economic world as a *feme sole*, and the lower cost would make this remedy available to working-class women.<sup>323</sup>

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321. See *infra* tbls. 1, 15, 17. From the petitions, I noticed that many of the women had small businesses, working as dressmakers, milliners, shopkeepers, innkeepers, and boardinghouse keepers.

322. Despite the fact that Parliament wanted to create a court that would make divorce and separation available to all classes of litigants, the costs of litigation still precluded many women from formally dissolving their marriages. The cost of even a simple uncontested divorce or separation generally ran between £80 and £100. See *infra* Part VIII.C.

323. It seems quite likely, therefore, that some of these petitioners for protective orders might use them as informal divorces. Because they could operate in the economic marketplace like *femes sole*, deserted wives could appear unmarried and perhaps contract a second marriage without legally dissolving the first. This is not entirely farfetched as there were a small handful of divorce petitions by husbands alleging bigamy by wives. To the extent that marriage still required some element of community repute, bigamy among the lower classes may in fact have been a significant problem. See E.P. THOMPSON, CUSTOMS IN COMMON 404-62 (1991), for more information about informal marriage and divorce practices among the working classes. See also STEPHEN PARKER, INFORMAL MARRIAGE, COHABITATION AND THE LAW, 1750-1989 (1990).

But, if the protective order was attractive enough to convince one in seven women entitled to a separation to seek only a protective order, why did they taper off so dramatically over the nine-year period?<sup>324</sup> To the extent these wives were using property orders strategically for other ends, the decline does not make sense. Without evidence that the judicial separation got easier or cheaper, it makes no sense that protective orders would taper off. Absent any other evidence that women were using the property order as a *de facto* divorce, the numbers seem to indicate that women sought and obtained exactly the remedy they desired.

The flip side of the question, however, must also be asked: namely, why did so many women seek a judicial separation which would not give them any significant additional rights beyond a protective order, except a public recognition of the separation? The only meaningful legal result was a return to *feme sole* status, which could be achieved by a cheaper, simpler property order. In other words, if there was no legal difference between a property order and a judicial separation,<sup>325</sup> why take the time, trouble, and money to get a judicial separation? And yet, 214 wives sought a separation during the same period that ninety-nine wives sought property orders.<sup>326</sup> Of course, property orders were not available to wives whose husbands had only committed adultery or were guilty of cruelty, but had not actually deserted them. But given the high rates of undefended (i.e., default) actions, it would seem that a majority of the divorce and separation actions were collusive, and could just as easily have been based on desertion.<sup>327</sup> Moreover, if the legal effect of the two actions was virtually the same, the women who had to seek the more time-consuming and expensive separation were at a disadvantage compared to those wives whose husbands deserted them. Ironically, the incentives to desert would seem quite high and it is surprising that desertion was not the most popular ground for all termination actions, especially since desertion was an easy way to achieve a mutually

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324. Women filed for sixteen property orders in 1858, out of a total of fifty-six petitions for divorce, judicial separation, and property orders, (29%) and only three property orders in 1865, out of a total of thirty-five (9%). See *infra* tbls. 4, 15.

325. There would be a defense against a restitution of conjugal rights suit brought by a husband when a wife had obtained a judicial separation, though these actions were so rare as to seem irrelevant to a wife's decision as to which action to pursue.

326. See *infra* tbls. 3, 11, 15.

327. Between January 11, 1858 and July 30, 1861, 445 divorce actions were brought, 416 were granted, and twenty-nine were refused. Of those 445 divorce actions, 315, or nearly 71% were undefended at trial. See *Returns, supra* note 317, at 183.

agreed-upon collusive divorce. The fact that it was not is significant, given the legal incentives to desert an incompatible spouse.

Perhaps even more interesting is that at least one in seven female petitioners were either running businesses, working for wages, or had property that they wished to protect from returning husbands.<sup>328</sup> In addition, all women who successfully obtained a divorce or a judicial separation would also have their property protected as they would be, *de jure*, returned to *feme sole* status.<sup>329</sup> By custom in London, married women who owned businesses could already enter into contracts as *femes sole*, and could own some limited property.<sup>330</sup> Thus, only women residing outside London may have needed the protection of a property order. And by 1870, the need for protective orders would decrease as married women would gain limited rights to own their own property.<sup>331</sup> The petitions reflect, therefore, that a significant number of wives were functioning in the economic sphere and viewed freedom to operate within that sphere as far more important than terminating their bad marriages.

The practical uses of protective orders and their place in the history of the breakdown of coverture have yet to be thoroughly analyzed, but the preliminary findings show that a significant number of married women were operating in the economic marketplace, contrary to the cult of domesticity that relegated middle-class women to the non-economic domestic sphere. They were willing to use protective orders to limit the power of their husbands to assert their traditional rights over the marital property.<sup>332</sup> The court appears to have treated these orders as com-

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328. See *infra* tbls. 5, 15. This number is likely to be higher because many of the women who obtained a divorce or judicial separation would also have been economic actors and received the benefit of property protections.

329. It was only in those cases where the divorce or judicial separation was not continued or dismissed, or the protective order was denied, that married women would still be vulnerable to their husbands claiming their property. The Married Women's Property Act was not passed in England until 1870, so the only way married women could protect their wages or assets was through a protective order, judicial separation, or divorce. An Act to Amend the Law Relating to Property of Married Women, 33 & 34 Vict., c. 93 (1870) (Eng.).

330. See BAKER, *supra* note 66, at 484; Beard v. Webb, 126 Eng. Rep. 1175 (C.P. 1800).

331. The first statute granting women property rights was passed in 1870, and was later strengthened in 1882. See 33 & 34 Vict., c. 93 (Eng.); An Act to Consolidate and Amend the Acts Relating to the Property of Married Women, 45 & 46 Vict., c. 75 (1882) (Eng.).

332. Caroline Norton experienced what may have been a typical crisis when her estranged husband, George, after numerous battles over custody and separation, and after they had been separated for years, demanded all savings and royalties from her books and

monplace and readily granted them with few inquiries. The sheer number of petitions in the first couple of years of the court's existence showed that many women rushed to do what they could to protect their property from deserting husbands. But why the numbers decreased so much as the period progressed is something of a mystery. It could be that many women did not feel a protective order was necessary, either because those who were at risk simply obtained a divorce or separation instead, or because fewer women were operating in the economic sphere and needed such protection. Perhaps they found that the protective order did not help very much, and they needed a separation or divorce anyway.<sup>333</sup> Thus, while protective orders were a significant function of the court in its first few years, the decrease in property petitions and the growing willingness of the court to interfere with property settlements between husbands and wives during dissolution indicate that the court's power over property may have been shifting to other avenues, like property settlements and alimony.

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poems simply by appearing at her banker's window. See NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7, at X–XI. She denounced this power in her next pamphlet and subsequently decided to stop paying her creditors. See *id.* at XI. She felt that if he could claim all her property then he should be forced to pay her debts, which was a husband's duty under coverture. When George refused, Caroline encouraged a creditor to sue George for payment of his wife's debts which enabled Caroline to appear and testify against her husband. See *id.* The entire sordid case exposed the problems with the property aspects of coverture when the parties did not obtain a legal divorce. George and Caroline had attempted to agree on a private separation agreement, but negotiations had broken down because George would not permit Caroline to have access to their children. See *id.* Thus, for most of her adult life, Caroline was a separated, married woman who had no property of her own, no right to her children, and no way to obtain a divorce or judicial separation to return her to *feme sole* status. Caroline's main problem with seeking a legal remedy to her marital woes was condonation. See *id.* A spouse who allowed an adulterous spouse back in his or her bed, or who allowed an abusive spouse back home was not entitled to a divorce because he or she supposedly condoned the adultery or cruelty and could not later seek a remedy because of it. See *id.* Caroline had allowed George back home after his last violent attack on her, even though they slept in separate rooms, and was thus not allowed to seek a divorce or separation. While the Married Women's Property Act did not explicitly abolish the doctrine of condonation, after 1858 the new court did not withhold remedies on this ground. For a full description, see *id.* at 79–93; and Holcombe, *supra* note 7, at 55.

333. See BEHLMER, *supra* note 298, at 199–200, for a discussion of the misperceptions of working-class wives who thought a protective order would protect them from violent husbands. They believed they could get “protection” in the magistrates’ courts as late as the 1950s. Although the Divorce Act gave the police courts the power to grant protective orders, these were for property, just like the power of the divorce court. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, § XXI (1857) (Eng.).

## B. *Property Settlements*

There were two situations in which property settlements for wives would be ordered by the new court. The first were cases in which the husband filed for divorce and received an award of damages from the co-respondent. The court could settle the award on the wife or the children, presumably seen by Parliament as a way to make the damages action more palatable.<sup>334</sup> The second were cases in which the court would order some settlement of property on the wife to adjust for the husband's marital breach or to account for property the wife brought to the marriage.<sup>335</sup> In neither situation were there many settlements, though the scarcity of cases suggests that one-time property settlements were not a priority for either litigants or the court. The numbers increased over time, however, while property protection petitions fell, suggesting perhaps that settlements began to replace property orders, even though they served very different classes of women.<sup>336</sup>

For those cases in which a husband sued his wife for a divorce on the grounds of her adultery and named the co-respondent, there was always a possibility that he would be awarded damages from the co-respondent for alienation of his wife's affections. This was essentially a continuation of the criminal conversation cause of action that had been a necessary precursor to a parliamentary divorce before 1858.<sup>337</sup> In the three and one-third years covered by the docket, husbands filed 441 divorce actions against their wives and a co-respondent, and in only twenty-four cases did the husband receive an order of damages from the co-respondent—an order that required a jury trial.<sup>338</sup> Thus, a little more than 5% of divorces by husbands resulted in a damages award, and in seven of those (or nearly one-third), the award was nominal (one farthing).<sup>339</sup> Eleven of those awards were over £100, and five of those

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334. The Royal Commission on Divorce acknowledged that Parliament was concerned for wives in early divorce actions by establishing the "Ladies Friend" to insure that wives had some property settlements. See ROYAL COMMISSION ON DIVORCE, *supra* note 6, at 11; Wolfram, *supra* note 2, at 161 n.22. Lawmakers seemed more concerned about men being able to use the damages awards to pay for the court costs in the divorce than in supporting errant wives. 145 PARL. DEB. (3d ser.) (1857) 918–19, 1412.

335. Readjustment of property settled upon marriage was not allowed until 1859 and the first set of amendments. See An Act to Make Further Provision Concerning the Court for Divorce and Matrimonial Causes, 22 & 23 Vict., c. 61, § V (1859) (Eng.).

336. See *infra* tbls. 15, 17.

337. Although Parliament abolished the criminal conversation action, it allowed damages under the same legal theory. See 20 & 21 Vict., c. 85, § XXXIII (Eng.).

338. See *infra* tbl. 4; *infra* tbl. 19.

339. See *infra* tbl. 19.

(or nearly half) were settled in a separate fund for the wife's use.<sup>340</sup> The largest award, £10,000 against the Marquis of Anglesey, appeared to have been agreed upon in advance as a way to compensate the husband for loss of property he was entitled to in the marriage settlement.<sup>341</sup>

Settling damages awards on wives was an innovation allowed under the new act, though it may have continued a practice in Parliament.<sup>342</sup> In the past, fallen wives were left to starve or be cared for by relatives or their seducers.<sup>343</sup> If the courts thought that fallen women would be forever supported by their seducers, they were out of touch with the likely fate of these women.<sup>344</sup> More likely, they would fall on the charity of their families or the parish when their seducers tired of them. Parliament also spent a significant amount of time debating the wisdom of a policy prohibiting a husband or wife from marrying the lover with whom he or she was guilty of adultery, which was the law in Scotland.<sup>345</sup> In some sense, the damages provision was in lieu of a remarriage prohibition. Lawmakers wanted to discourage seduction, but were not willing to go so far as to prohibit remarriage by the guilty parties, especially if remarriage would force the seducer to support the woman whose reputation he had destroyed. While the damages provision does not necessarily serve the same ends as a prohibition on remarriage, the provision indirectly serves the same end as the refusal to prohibit the remarriage; namely, both reflect a concern with protecting fallen women. Hence, the ability to settle the damages awards on these women was a way to still punish seducers and yet protect fallen wives, while the remarriage prohibition only accomplished the former.

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340. See *infra* tbl. 19.

341. See HORSTMAN, *supra* note 2, at 144.

342. See ROYAL COMMISSION ON DIVORCE, *supra* note 6, at 11–12; Wolfram, *supra* note 2, at 161.

343. A particularly heinous situation arose in Mrs. Henry Wood's famous novel of the period, *East Lynne*, in which the heroine, seduced to leave her husband and children, is finally divorced and begs her seducer to marry her. His callous response, however, would send a chill down the spine of any Victorian wife who had fantasized running off with her lover. He responded that now that he had come into his estates he certainly could not demean himself by marrying a divorced woman. See MRS. HENRY WOOD, *EAST LYNNE* (Rutgers Univ. Press. 1984) (1861).

344. Count Vronsky, in Leo Tolstoy's *Anna Karenina*, appears to have been rarer than most seducers in that he wanted to marry the women he had ruined. See LEO TOLSTOY, *ANNA KARENINA* (Richard Pevear & Larissa Volokhonsky, trans. 2001). Sir John Trelawny was more worried that women would commit adultery to benefit their children. 147 PARL. DEB. (3d ser.) (1857) 1870.

345. See 145 PARL. DEB. (3d ser.) (1856) 1982; 142 PARL. DEB. (3d ser.) (1857) 491–515. Also, this prohibition existed in some of the American states until into the 1960s.

**See Table 19 in Appendix:**  
**Damage Awards (1858–1861)**

Criminal conversation actions in the century before the new court, however, reflect markedly different outcomes than those overseen by Sir Cresswell. Between 1770 and 1850, more than half of the 143 damages actions that preceded parliamentary divorces resulted in an award of £1000 or more.<sup>346</sup> Of 143 cases, only five gave nominal damages of less than £5, and seven gave very high awards between £10,000 and £20,000.<sup>347</sup>

The small number of cases after 1858 that resulted in such an award is not surprising. Commentators had criticized the criminal conversation action for years as an embarrassment to national honor.<sup>348</sup> Some saw it as a method for collusive couples to prostitute the wife, blackmail the unsuspecting lover, and set themselves up with a tidy nest egg. Others saw it as a way for dishonorable men to buy off the victims of their debauchery, especially aristocratic scoundrels who preyed on wholesome middle and working-class families.<sup>349</sup> Although it was a necessary precursor to a parliamentary divorce in the years immediately preceding the reform, its rapid disappearance suggests that even husbands had little desire to retain the action.

Besides being socially unpalatable, the criminal conversation action was also criticized for affirming a wife's status as property because it was brought only by her husband who alleged the loss of her services.<sup>350</sup> The wife was not a party to criminal conversation actions and her consent to the seduction was deemed irrele-

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346. See PHILLIPS, *supra* note 13, at 228; see also Wolfram, *supra* note 2, at 170 (detailing the amount of damages awards in Parliamentary divorces between 1780 and 1857).

347. See PHILLIPS, *supra* note 13, at 228. See generally Staves, *supra* note 27.

348. See 145 PARL. DEB. (3d ser.) (1857) 912–30; STONE, ROAD TO DIVORCE, *supra* note 2, at 273–85. See generally KOROBKIN, *supra* note 27.

349. Interestingly, both Lady Westmeath and Caroline Norton were accused by their husbands of having committed adultery with powerful men of the time (the Duke of Wellington in the former and Prime Minister Melbourne in the latter); only the latter's husband actually filed a criminal conversation action against his wife's alleged lover and lost. *Norton v. Lord Melbourne*, 132 Eng. Rep. 335 (P. 1836). But, both actions were seen by many commentators of the period as having been motivated more by political designs than by hurt feelings. See STONE, BROKEN LIVES, *supra* note 2, at 310–11.

350. The action is in the same class as seduction and breach of promise of marriage actions—so-called heartbalm actions—which originated in the property actions of ravishment of ward. See Jane Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'"; *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 382–94 (1993).



vant.<sup>351</sup> Nor could she bring a similar suit against her husband's mistress under the old criminal conversation action.<sup>352</sup> Although damages actions in the new court did allow the wife to be a party to the suit, these actions were clearly tainted by the old male-dominated criminal conversation action. In the debates on the 1857 statute, lawmakers spent some time deriding the old action and trying to justify its continuation in the new court, but the lack of substantive legal change in the damages action suggests that social changes, more than the modest legal reform, caused the size and number of these awards to so dramatically drop.<sup>353</sup> While damages were seen as an important disincentive to seducers—making them think twice before breaking up another man's family—they were also seen as a way men could buy and sell one another's wives. One wonders if this so-called wife-selling declined because women could now bring their own divorce actions and were no longer willing to be bought and sold as high-class chattel, or because they were seen as better able to provide for themselves after 1858.

Historians of masculinity have also noted that in the nineteenth century, changing notions of male honor made it unseemly for husbands to accept money from their wives' seducers.<sup>354</sup> Yet, discouraging seduction was an important aspect of Victorian morality.<sup>355</sup> Without abolishing the action, Parliament allowed the court to continue damages actions, but it encouraged putting the awards to the benefit of the fallen wife.<sup>356</sup> Hence, in nearly half of the cases involving sums over £100, the money was used to provide for the wife or her illegitimate children and did not end up in the husband's pocket.<sup>357</sup> In either event, the scarcity of awards suggests that the possibility of damages posed little disincentive

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351. See NORTON, LETTER TO THE QUEEN, *supra* note 7, at 10–11; NUGENT, WESTMEATH, *supra* note 7, at 103–06.

352. *Id.*

353. 145 PARL. DEB. (3d ser.) (1857) 912–30.

354. See generally Staves, *supra* note 27, and TOSH, *supra* note 37, at 154–55 (concerning the effects of the separate domestic sphere on middle-class men and the social purity movement's efforts to rein in male sexuality). Most members of Parliament saw the criminal conversation action as a national embarrassment and sought to abolish it, while still providing a disincentive to men to seduce other men's wives. 145 PARL. DEB. (3d ser.) (1857) 912–30.

355. See Larson, *supra* note 350, at 388–93; MACQUEEN, *supra* note 10, at 130–34 (detailing the complex issues arising in these damages actions).

356. See *infra* tbl. 19.

357. This was permitted pursuant to section XXXIII of the act. An Act to Amend the Law Relating to Divorce and Matrimonial Causes in England, 20 & 21 Vict., c. 85, § XXXIII (1857) (Eng.). It is also possible that some of the other awards were put to the wife's use by informal or mutually agreed upon settlements.

to seduction, especially when the award was no longer a prerequisite to a divorce.

The second way in which the court could order property settlements for wives occurred when the wife proved the grounds for her divorce or judicial separation and the court believed the property of the parties needed readjustment or the adulterous wife had brought property to the marriage that, in all fairness, should be readjusted for her benefit.<sup>358</sup> As with the damages awards, these property settlements were also quite rare—thirteen total out of 957 cases of divorce and judicial separation.<sup>359</sup> Eight of these occurred in cases brought by wives and five in cases brought by husbands.<sup>360</sup> Twelve were in cases of divorce and only one in a case for a judicial separation.<sup>361</sup> Most important, however, was the form which the property settlements took. Four involved settlements to trustees or variations in trust settlements; two were one-time payments to the wife; three were settlement provisions for the children of the marriage—one of which may have been for an illegitimate child born by the wife to her lover; one was a property settlement on the wife; two were readjustments to property acquired from the parents upon marriage; and one was of unknown disposition.<sup>362</sup> It is unclear if the settlements on the wife were in trust or were to be placed directly in her control. Not considering those, the majority of settlements involved property provisions that were purposefully settled out of the wife's control—four to trustees and three to children.<sup>363</sup> Most likely, the readjustments for property acquired from parents were also in trust, and the settlements would have been annuities or some form of investment in which the wife would have a yearly income. Thus, only two of the thirteen settlements clearly gave the wife immediate control over property; the rest most likely were settled out of her reach and under the control of male trustees.<sup>364</sup>

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358. MACQUEEN, *supra* note 10, at 126, 157 (noting that an American precedent of settling property (in that case slaves) on the wife would not be followed in England).

359. *See infra* tbl. 20.

360. *See infra* tbl. 20.

361. *See infra* tbl. 20.

362. *See infra* tbl. 20.

363. *See infra* tbl. 20.

364. This trend, unfortunately, is not so unusual even today when elective share statutes often allow husbands to meet their marital property obligations by merely leaving their wives a life estate in trust for the statutory share. Upon divorce this is not the case, but settlements in trust reflect outmoded views that wives are incompetent money handlers and require male trustees if they are to be kept from squandering their money or fal-

### See Table 20 in Appendix:

#### Property Settlements on Wives (1858–1861)

These rare property settlements tell us an important story. In a little more than 1% of divorce and judicial separation actions a property settlement was ordered.<sup>365</sup> There were more than ten times as many alimony orders made,<sup>366</sup> indicating that divorce was not likely to result in the parties walking away with a final property settlement that would enable them to avoid future contact with one another. While many divorces today result in property dispositions that constitute a final, one-time split of the couple's assets,<sup>367</sup> this type of severance was rare indeed in the early years of the new court. Although there may certainly have been many more instances of out of court property agreements between divorcing husbands and wives than are noted here—even agreements that definitively settled their property claims—very few of those were adjudicated by the court as part of the dissolution process.<sup>368</sup> This suggests one of three conclusions: (1) that the court envisioned ongoing obligations of husband to wife, through alimony as the normal model of post-dissolution interspousal property relations; (2) that the parties used private property agreements to settle the support obligations of husbands and to return a wife's property back to her side of the family; or (3) that most parties did not have enough property to concern the court in the first place. A combination of all three is likely to be true. When we add to these relatively scarce awards the dwindling number of protective orders, we find that, as the decade progressed, putting adequate property into a wife's hands post-dissolution apparently was not a principal concern of the court.

The court's power to modify property arrangements as provided in the 1857 Act, which was limited to making provisions for "the innocent Party, and of the Children of the Marriage,"<sup>369</sup> was

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ling prey to unscrupulous seducers. See, e.g., Ira Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse Under the Redesignated Elective-Share System: Some Concerns and Suggestions*, 55 ALB. L. REV. 941, 950–53 (1992); Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1994–1995); Mary M. Wenig, "Taxing Marriage," 6 S. CAL. REV. L. & WOMEN'S STUD. 561, 567–68 (1996).

365. See *infra* tbls. 3, 20.

366. See *infra* tbls. 20, 21.

367. Of course, many modern property settlements are moving back toward a commingling of property post-divorce, as with the qualified domestic relations orders used to deal with pension assets.

368. See *infra* tbl. 20.

369. See An Act to Amend the Law Relating to Divorce and Matrimonial Cases, 20 & 21

enlarged in 1859 to include consideration of ante-nuptial or post-nuptial settlements on either party and could be altered for the benefit of either, regardless of fault.<sup>370</sup> Thus, the court did not have the power to alter settlements made on the marriage of the parties by parents or friends until the 1859 amendments,<sup>371</sup> though they could make property distribution orders for property owned as marital property from the court's inception.<sup>372</sup> According to legal commentators, property settlements were motivated by a rule of protecting the innocent spouse as much as possible.

The guiding principle of the cases is, that where the breaking up of the home is due to the conduct of the respondent, the Court ought to place the petitioner and the children, as nearly as possible, in the same position as if the family life had not been interrupted.<sup>373</sup>

The scarcity of these orders, however, undermines this claim of legal significance while supporting an interpretation that marital property was very likely to be deemed the sole property of the husband and not subject to adjustments to support an innocent or guilty wife.

While modifying property arrangements between divorcing spouses was not a priority of Parliament either, the property settlements do tell us a few things about the use of the court for settling property upon divorce. Ironically, while many women had complained about the way fathers denied mothers access to their children in order to get their wives' consent to invade separately settled property,<sup>374</sup> only one of the property settlements arose in a case in which custody of children had been an issue. This suggests that for most married couples, custody of children and property were not intertwined. The number of settlements are so small given the number of cases that were heard by the court during this period that the most obvious conclusion is that most people handled their property settlements outside the notice and au-

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Vict., c. 85, § XIV (1857) (Eng.).

370. See *An Act to Make Further Provision Concerning the Court for Divorce and Matrimonial Cases*, 22 & 23 Vict., c. 61, § XLV (1859) (Eng.).

371. See *id.*

372. See *Norris v. Norris*, 164 Eng. Rep. 680, 681 (P. 1858).

373. LATEY & BROWNE, *supra* note 230, at 169.

374. Even if the actual data does not show evidence of this method of intimidation and "bargaining," there is a strong belief among women that men will use a demand for custody in the divorce to get their wives to reduce their property claims. For example, this occurred in the *Westmeath* and *Norton* cases. See NORTON, CAROLINE NORTON'S DEFENSE, *supra* note 7, at VIII; NUGENT, WESTMEATH, *supra* note 7, at 73, 93-94; STONE, BROKEN LINES, *supra* note 2, at 312; see also Bailey, *supra* note 30, at 413. For a thorough discussion of modern U.S. child custody statistics, see generally ELEANOR E. MACCOBY, ET AL. *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* (1992).

thority of the court. And, when they did come before the court, the result was most likely a settlement for the benefit of the wife, which she could not directly control.<sup>375</sup>

### C. *Alimony Awards*

The most common form of settling property disagreements between separating couples was an award of alimony. Notably, a wife was entitled to alimony *pendente lite* whether she was the petitioner or the respondent. But only if a wife was successful, would a permanent alimony order be entered, which was rarely for the same amount, if any, as the amount of the alimony *pendente lite*. Usually, alimony *pendente lite* would be calculated at approximately one-fifth of the family's income, while permanent alimony would be calculated at between one-third and one-half of the family's income.<sup>376</sup> But the number of instances in which a separate permanent alimony order was entered after an alimony *pendente lite* order was granted was rare, so it is difficult to confirm the legal norm that permanent alimony would be higher than temporary alimony.<sup>377</sup> In looking at alimony orders, I generally did not distinguish between permanent and temporary alimony orders, assuming that any award of alimony was likely to give the wife the moral and perhaps legal right to demand that her ex-husband pay her bills or release funds for her benefit. Because the parties could structure their alimony payments as they chose, I can only remark on the frequency with which the court granted alimony petitions, their amounts, and the frequency with

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375. Settlements in trust and settlements for children, which made up seven of the total number of properly settlements, were settlement types the wife could not directly control. See *infra* tbl. 20.

376. Cornish & Clark, *supra* note 2, at 389; MACQUEEN, *supra* note 10, at 137; see also Whieldon v. Whieldon, 2 Sw. & Tr. 388 (1861).

377. This partly confirms Lawrence Stone's claim about women's use of the court to gain alimony. See STONE, ROAD TO DIVORCE, *supra* note 2, at 183. Mr. Henley, in the House of Commons, agreed that "[i]n many cases at present suits were instituted solely with the object of getting the Court to settle alimony, and when that had been done no further steps were taken." 147 PARL. DEB. (3d ser.) (1857) 1259. There may be an important distinction to be made between alimony and an annual property settlement or maintenance. Generally, women who obtained separations were entitled to alimony, while women who obtained dissolutions were entitled to a property settlement; it is difficult to tell which was better. But in 1861, Sir Cresswell ruled that a property settlement upon divorce should be less than alimony because "the wife ought not to be left destitute; on the other hand, I think it would not be politic to give to wives any great pecuniary interest in obtaining a dissolution of the marriage tie." Fisher v. Fisher, 164 Eng. Rep. 1055, 1056 (P. 1861); Freeman, *supra* note 5, at 337 n.162.

which the court issued writs of attachment for non-payment of alimony.

The court ordered alimony in a total of 153 cases during the three and one-third years covered by the court docket.<sup>378</sup> That represents eighty-five in divorce actions, fifty-eight in judicial separation actions, four in restitution of conjugal rights actions, one in an annulment action, and five in actions that were unknown.<sup>379</sup> There were a total of 1,005<sup>380</sup> causes of action noted in the docket for this period, so alimony orders occurred in roughly 14.6% of cases; it was requested in approximately 178 cases (or 17%).<sup>381</sup> There was no significant increase in the number of alimony orders made over the three and one-third year period, though there was a decrease in the length of time the court took between the filing of the petition and the granting of the order. Alimony *pendente lite* petitions were usually filed immediately after the petition for termination, and permanent alimony petitions usually were not filed until shortly before, or sometimes after, the final termination hearing. Alimony was requested in ninety-four cases in the full docket and granted in eighty-one of those. This indicates a success rate of more than 86% for the alimony petitions noted in the docket.

But, a high success rate is to be expected when we consider that all wives, whether as petitioner or respondent, were legally entitled to alimony.<sup>382</sup> A legal entitlement to alimony, however, did not guarantee meaningful financial support. Many of these alimony awards were granted in cases brought by husbands for divorce that were ultimately successful, thus representing very short-term financial commitments to wives who had gone astray. Also, the number of alimony awards that were granted in cases in which the wife's suit was dismissed or where either party's case was not continued reflect tenuous or short-lived support pay-

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378. See *infra* tbl. 21.

379. See *infra* tbl. 21.

380. This number does not include the ninety-nine petitions for protective orders of property. See *infra* tbl. 15.

381. See *infra* tbl. 21. There were ninety-four requests in the full docket, out of which came eighty-one orders. In the summary docket there were seventy-two orders which, if we calculate requests at the same rate, would indicate approximately eighty-four requests in the summary docket, for a total of 178 requests during the first three and one-third years.

382. The high success rate for women who asked for alimony obscures the fact that 85.4% of all wives received no alimony protections, either because they did not ask for it (83%), or they were denied it (2.4%). See *infra* tbl. 3; *infra* tbl. 21.

ments.<sup>383</sup> Of the 153 alimony orders, as many as ninety-four (or 61%) were likely to be short-lived or legally unenforceable if the husband refused to pay.<sup>384</sup>

### See Table 21 in Appendix:

### Alimony Awards (1858–1861)

Not surprisingly, husbands then, as today, did not always pay their alimony in a timely manner. The court issued thirty-six writs of attachment against husbands for non-payment of court ordered obligations—twenty were for non-payment of court costs and sixteen were for non-payment of alimony. At least 10% of husbands apparently defaulted on their alimony obligations.<sup>385</sup> Moreover, fewer than 15% of wives who were entitled at least to alimony *pendente lite* actually petitioned for it.<sup>386</sup> While this may have reflected the simple reality that many wives knew they would be unable to collect, especially from husbands who had deserted them, it does show that a few wives did leave the court with some form of financial support, even if it was just temporary.

In sum, in the first three and one-third years, ninety-nine wives sought protective orders for property, 153 received at least short-term alimony, thirteen received a property settlement, and six may have received some settlement from damages awards.<sup>387</sup> All told, 271 wives, out of 1,144 cases (24%) emerged from the new court with a property order that would give them some independent way to protect their livelihood and property.<sup>388</sup> But, lest we think that one-quarter of wives had adequate support post-dissolution, ninety-four of the alimony awards were in cases with little likelihood of long-term continuation.<sup>389</sup> Thus, those wives most likely lost all support upon termination of the marital suits.

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383. The number of not continued suits may also indicate the extent to which wives did in fact seek primarily alimony and, once obtained, choose to discontinue their suits. See STONE, ROAD TO DIVORCE, *supra* note 2, at 183.

384. The short-lived alimony cases were those in which the husband's suit was granted (thirty-nine) and the wife's suit was dismissed (twenty), or either spouse's suit was abandoned (thirty-five). See *infra* tbl. 21.

385. Husbands defaulted in sixteen out of the 153 alimony awards granted by the court. See *infra* tbl. 21. That percentage may be even higher if we consider only those fifty-nine alimony awards that were likely to be of longstanding duration.

386. Every wife could ask for alimony *pendente lite* during the suit, whether she was the petitioner or the respondent; sixty-three wives did request alimony *pendente lite* in divorce suits brought by their husbands. MACQUEEN, *supra* note 10, at 136.

387. See *infra* tbls. 19–21.

388. See *infra* tbls. 2, 19–21.

389. See *infra* tbl. 21.

So too did those wives (six) who received a settlement from the damages awards ordered upon the co-respondents; neither their husbands nor their lovers were required to support them after the dissolution. Those wives who sought a protective order did so because they already had acquired separately earned property and their husbands had deserted them so they had no illusions of support from their male breadwinners. Only sixty-seven wives initiated suits and received some form of compensation along with their marital termination, either in alimony or a property settlement,<sup>390</sup> and over half of those women received alimony of less than £50 per year.<sup>391</sup>

The number of protective orders shows that one in six women were more interested in protecting their property than in ridding themselves of errant husbands, and the court responded favorably to their petitions. But the relative infrequency of a property settlement or alimony order that would allow a wife to be supported by her former husband shows that post-dissolution property settlement was not a priority for the court or the litigants, and that few women left the court with an order for ongoing support by their former spouses. In the absence of any other evidence, it would appear that the vast majority of wives left the court protected from errant husbands raiding their savings, but without any meaningful support or property settlement that would provide for their living post-divorce. There were fewer than ten cases in which the court identified any sums that were to be used for child support. So most of these women were left to the care of their families, to their own ingenuity and skill to make a living, or to the benevolence of their seducers; and less than 1% could expect any help supporting the children—if they were even lucky enough to get a custody order or they retained *de facto* custody.

### VIII. CLASS VARIATION FOR CLIENTS OF THE NEW COURT

Determining the class of the petitioners and respondents was difficult because information on the economic status of the parties was scarce and gave only broad, general indicators of class. I noted, where available, the occupations of the parties—usually the husband—from the petitions. I also noted the size of alimony

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390. See *infra* tbls. 19–21.

391. See *infra* Part VII.C. and tbl. 23 for a discussion of alimony.



awards in order to get an indication of the annual income of the couple. Alimony was usually set at one-fifth to one-third of the family's annual income.<sup>392</sup> I noted property settlements, and their size, when available. The alimony and property settlements, as noted above, were quite rare, arising in fewer than 16% of marital termination cases—153 alimony awards, thirteen property settlements, and six damages awards<sup>393</sup>—so it is only a small percentage of families for whom we have even this sparse data. Finally, I noted court costs. Although these costs are not directly correlated to class, there appeared to be certain cases that cost significantly more than the average, and I would assume that poorer couples could not afford the most expensive attorneys and procedures. While most cases seemed to cost around £100 to reach a final dissolution order, there were some in which the court, inexplicably, required a deposit of £800 before setting the matter for a final hearing and nothing in the docket indicated why.<sup>394</sup> On the other extreme, a few cases were filed *in forma pauperis* by petitioners who claimed to be below the threshold level of £5 yearly income to bring suit. Thus, to analyze the parties by class, I used three markers—occupation, alimony, and costs—recognizing that these are very broad markers indeed.

### A. Occupation

Although half of the petitions were brought by wives, they were very reticent in identifying what, if any, occupation in which they were engaged. Of the few petitions that listed an occupation for the wife, they depict wives who were either in the service industry (cooks or servants), some form of dressmaking business (dressmaker, milliner, or trimmings shopkeeper), or kept a public house.<sup>395</sup> One lived in the workhouse.<sup>396</sup> There was far greater information about the occupations of husbands, though out of 551 petitions the husband's occupation was identified in only thirty-eight.<sup>397</sup> The majority of these occupations would be considered

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392. See *supra* note 376 and accompanying text.

393. See *infra* tbls. 2, 19–21.

394. It would appear that these large deposit requirements were a form of escrow for couples disputing property settlements and were required by the court to cover not only legal fees and costs, but perhaps also the cost of a later expected property settlement for the wife.

395. See *infra* tbl. 22.

396. See *infra* tbl. 22.

397. See *infra* tbl. 22.

solid working-class (sailor, miner, carpenter, fisherman, railway porter, publican, valet, clerk, plumber, and soldier). A few were respectable middle-class occupations (manager of a silk company, landscape painter, music teacher, engineering worker, minister, solicitor, captain in the highlanders, and officer in the East India Company). Only about six cases indicated that some member of the aristocracy was involved. And on the other end, five husbands were in prison, and one was a gambler. One was even a servant to the famous ecclesiastical court jurist, Dr. Lushington.

**See Table 22 in Appendix:**

**List of Occupations by Husband and Wife**

While we cannot draw any firm conclusions about the class of the petitioners from thirty-eight cases, what we do see is a relatively even cross-section across urban occupations.<sup>398</sup> Servants, clerks, and prisoners on one end, to engineers, teachers, ministers, and aristocrats on the other. What is notably missing, however, are indications of rural occupations. Other than fishermen, and perhaps the miner, there are no occupations listed that would be identified as rural or agricultural workers.<sup>399</sup> While many of the soldiers may have been stationed in rural areas, most of these husbands probably worked in London in order to have access to the court. Although there may not have been an explicit class bias by the court, there would certainly have been a geographic bias against non-Londoners.<sup>400</sup> There were also frequent references to husbands who had deserted their wives—who were in China, New Zealand, Australia, and the United States—but few indications of their occupations in these countries were given.

The evidence about occupation that exists is anecdotal at best, though when we include the number of cases that were brought *in forma pauperis*, we see at least some effort by the court to

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398. Gail Savage undertook an analysis of the divorce and separation cases that were reported in *The London Times* for the fifty years following passage of the divorce act. Her findings show similar class patterns: eight in the military, twenty-one in trades (drapers, clothiers, and shopkeepers), nine in the working class (butler, carpenter, sailor, and compositor), two were men of independent means, four were professionals (doctors, solicitors, and clergy), two were clerks, four were in the theatre, plus a smattering of other professions (architect, engineers, veterinary surgeon, newspaper editor, stockbrokers, and master of a boy's school). See Gail L. Savage, *The Operation of the 1857 Divorce Act, 1860–1910: A Research Note*, 16 J. SOC. HIST. 103, 106 (1983).

399. See *infra* tbl. 22.

400. Parliament addressed this very problem in the debates, and its solution was to set the court in London but make certain issues triable at *nisi prius*. 142 Parl. Deb. 1980, 1986 (1856).

serve low-income populations. In the first three and one-third years, nine pauper cases were brought out of 1,045—five by wives and four by husbands.<sup>401</sup> Because many of these cases cost between £80 and £100 to bring, and the court was located in London, the prevalence of respectable working and middle-class occupations is not surprising. More information is needed to determine exactly how well the new court made divorce available to all classes of people.<sup>402</sup>

### B. *Alimony Orders*

The alimony orders granted by the court in the first three and one-third years also show the range of class of the petitioners. Over half of the awards were for less than £50 per year, indicating yearly household incomes of about £150 to £250 per year.<sup>403</sup> Less than 10% (twelve out of 153) were for £200 per year or more, indicating household incomes of around £1000 per year.<sup>404</sup> There was no alimony award of more than £1000 per year, which indicates that the very rich were not seeking alimony awards in the court. This too is not surprising, as the very wealthy were likely to have had complex settlements and equitable estates that would have been fully entailed long before the parties sought a divorce or separation. It is perhaps significant, however, that a wife was more likely to get an alimony award in a case brought by her husband than in one brought by herself if the amount was at the low end (less than £50 per year),<sup>405</sup> but in the higher income brackets the numbers are reversed.<sup>406</sup> Overall, wives received alimony in ninety cases initiated by themselves and in sixty-three cases brought by husbands.<sup>407</sup>

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401. See also MACQUEEN, *supra* note 10, at 365 (elaborating on the procedure for suing *in forma pauperis*).

402. See GLENDON, *supra* note 5, for discussion of how the lower classes demanded the formalities afforded by the courts in the United States.

403. See *infra* tbl. 23. An income of £150 to £300 per year indicates a lower, middle-class existence in the nineteenth century; a family in this range could eat well and employ a servant. In London, however, a typical middle-class family would have two to three servants and require an income of £500 to £2000 per year. See DAVIDOFF & HALL, *supra* note 183, at 23; TOSH, *supra* note 37, at 12.

404. Assuming alimony at one-third to one-fifth yearly income, an alimony award of £200 would indicate a likely income of £600 to £1000 per year.

405. See *infra* tbl. 23.

406. See *infra* tbl. 23.

407. See *infra* tbl. 23. The slight difference in numbers reflects the "other" category

**See Table 23 in Appendix:****Alimony Orders in Docket (1858–1861)**

Table 23 shows that, at the lowest income bracket, wives asked for alimony just as often in suits they brought as in suits their husbands brought—seventeen in suits by husbands and seventeen in suits by wives<sup>408</sup>—but as the income levels grew, wives asked for alimony in significantly greater proportions in suits they brought than in suits brought by their husbands.<sup>409</sup> The decline of alimony requests by wives in divorce suits brought by husbands may indicate that these fallen women had other likely means of support from their seducers. Also, as we move up the income scale, a demand of alimony was not likely to stop the suit and, therefore, would not operate strategically to get their husbands to discontinue the termination action. It is also likely indicated that the income level of the wife's seducer was comparable to that of the husband, and that the costs of the suit or the wife's support were not overly taxing.<sup>410</sup> At the lowest income levels, alimony *pendente lite* petitions were common, which may indicate that wives at the lower income levels needed the alimony more than wives at the middle and upper levels. At the upper levels, permanent alimony was more likely to be requested by wives in their own termination suits than in suits brought by their husbands. Although the numbers are relatively small (153), alimony requests clustered most in income levels under £200 per year and, as mentioned earlier, less than half would have resulted in any long-term, post-termination support.<sup>411</sup>

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which includes cases brought by wives and husbands.

408. See *infra* tbl. 23.

409. Twenty men and twenty-nine women received between £26 to £50, while eight men and twenty-one women received £51 to £75. See *infra* tbl. 23. Four men and twelve women received between £76 to £100; however, four men and six women were awarded between £101 and £150. See *infra* tbl. 23.

410. Sybil Wolfram's work also shows a relative similarity in the class status of husbands and co-respondents in criminal conversation actions. See Wolfram, *supra* note 2, at 164, 186.

411. See *infra* tbl. 23. Family income levels of around £200 per year would generally indicate a lower, middle-class range in rural settings and, perhaps, an upper, working-class range in the city. See *infra* note 403. The fact that most alimony awards clustered in this range suggests that alimony was primarily a form of relief for lower-income level petitioners.

### C. *Orders on Costs*

Orders on costs occurred in about one-fifth of cases—101 in the court docket and eighty-six in the summary docket database for a total of 17.7%—and the average award of costs was £115.<sup>412</sup> While court costs obviously correlate to whether the suit was opposed, the number of pleadings, whether it went to a jury, and the like, the wealthier the parties the better able they would be to pursue extensive and costly litigation tactics. The least amount of costs for an undefended complete termination action was £14, while the most expensive was £1,260. The few cases with excessive costs skews the average amount toward the high end. One hundred forty-four cases had costs under £150,<sup>413</sup> while only forty-two had costs exceeding £150.<sup>414</sup> The median cost was £80.<sup>415</sup>

#### **See Table 24 in Appendix:**

#### **Costs (1858–1861)**

If the majority of alimony orders arose in families whose yearly income was around £150, and the median cost of a divorce or judicial separation was £80, then many people were willing to spend roughly half their yearly income to resolve their marital problems. Moreover, the amount listed by the court for costs generally included only the wife's attorney's fees and court costs in suits by wives, or the husband's and wife's attorney's fees and court costs in suits by husbands, in which the costs would be taxed to the co-respondent. Thus, the attorney's fees of the person taxed with costs would rarely be included in the amount ordered by the court, so the amount identified could be as low as 50% of the true cost.

Although the costs are going to tell us more about the complexity of the court's procedure than about the class of the parties, it is notable that the court entered orders on costs in less than 20% of cases.<sup>416</sup> Naturally, the costs involved in the protective property orders were minimal and, not surprisingly, were not indicated in the docket.<sup>417</sup> In addition, the large percentage of cases that were

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412. See *infra* tbl. 24. The average cost of £115 was an average of the exact costs ordered for all 187 cases.

413. See *infra* tbl. 24.

414. See *infra* tbl. 24.

415. See *infra* tbl. 24.

416. See *infra* tbl. 24.

417. These deserted wives also could not serve notice on their husbands in order to seek an order on costs, so compensation simply was not an option.

not continued would not result in an order on costs.<sup>418</sup> And, the court often ordered the co-respondent or the respondent to pay costs without entering a specific amount. Besides the 101 orders on costs identified in the court docket, an additional 157 orders on costs were made without indicating an amount. Thus, the court made some sort of order on costs in 44% of the total cases filed—61% of cases that were either dismissed or granted.<sup>419</sup> In the remaining 56% of cases, the costs would presumably lie with each party unless arrangements were made outside the court.

The expenses and costs of court proceedings clearly had different effects on men and women. Women were never expected to pay their own costs, even if they were guilty of the marital fault, because the law of coverture denied them any property with which to pay them. Women who had been deserted, however, would have to find enough money to pay their lawyers and the court costs up-front because there was little likelihood of any reimbursement, even though they were entitled to it. Perhaps lawyers took these cases on a type of contingent fee basis, being willing to forego payment until a final judgment would restore a wife to *feme sole* status and she could legally pay her own expenses. And many women may have had fathers or brothers willing to foot their bills. Either is a phenomenon that is difficult to uncover.

Petitioning husbands would have to pay all costs of litigation for both themselves and their wives through to a final order, and only after an order taxing costs to the co-respondent and, perhaps, the costs of a writ of attachment might they obtain recovery from their wives' seducers. This certainly had a differential impact on middle and lower-class men, the latter often not being able to front the attorney's fees for both sides of the litigation just to get rid of an adulterous wife. On the other hand, until the court ordered a separation, a wife had no control over money and property and certainly could not be expected to pay her own costs. And, if the co-respondent was unknown or unable to pay any ordered costs, all legal expenses would fall to the husband.

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418. An award on costs only occurred at the termination of the suit, either through granting or denial of a petition. Suits that were abandoned did not yield an order on costs.

419. The cases that were not continued would not have an order on costs. Thus, of the cases that reached a final order, 61% included an order on costs. The other 39% of cases reaching a final order, however, simply had no mention made of any issue relating to costs. Of the 730 petitions that resulted in a final order, 187 had specific cost orders with an amount and 157 ordered costs without an amount. See *infra* tbls. 5, 24.

Getting a sense of the class of the litigants in this new court is difficult, and my conclusions are obviously quite tentative. Not surprisingly, though, the groups least represented appear to be the extremely wealthy and the extremely poor. Those working-class and lower, middle-class couples who did choose to use the court to end their marriages, however, appeared willing to spend upwards of £100 to divest themselves of an adulterous husband or wife. Considering that the majority of the litigants of both sexes had been married more than ten years,<sup>420</sup> they may have accumulated adequate assets to pay the court costs and attorney's fees without significant financial harm. The rather high costs may indeed have contributed to the relative infrequency of divorces by husbands and wives in the first five years of marriage and in the latest years of marriage where earning potential may have been relatively low or the benefits perceived to be not worth the costs.

## IX. CONCLUSION

The new divorce court faced a number of difficulties when it opened its doors on January 1, 1858. It was expected to cure the injustices of the earlier cases without causing any major upset to the status quo. Divorces were to be rare and discouraged, but truly deserving wives were to be released from their domestic hell. Husbands of adulterous wives were to be given a cheaper, simpler process to set aside their wives and begin anew, especially if they had no legitimate heirs. The worst aspects of coverture were to be mitigated to allow working-class wives the ability to continue as productive economic actors. But the substantive rules were not to change. Divorce was a social evil to be discouraged; the only wives who were to get a divorce had to be particularly deserving, and the Victorian family was to remain staunchly under the control of the family patriarch. But, despite what seems like minor substantive changes in the law, the court was tremendously popular. And being popular meant that it eventually became an accepted part of the legal institution of marriage and profoundly changed some aspects of marital behavior.

The fact that more women brought suit than men was probably the most unforeseen result. But the high rate of default (i.e., undefended) suits was probably equally unforeseen, as Parliament

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420. See *infra* tbl. 9.

expected the court to follow earlier rules on connivance and collusion strictly. Sir Cresswell's seeming unconcern with the vast number of default cases may have stemmed less from his concern about conspiracy and collusion than his recognition that despite the idealistic world of law and religious dogma, these people really needed their marriages terminated. The reality of adultery, cruelty, and desertion was, I could imagine, so overwhelming in Sir Cresswell's eyes that fear of collusion simply lost its cogency.

In the eyes of Parliament, however, the new court truly inaugurated the divorce epidemic. The rate of divorce petitions rose from four to 324 in one year, an increase of 8,100%.<sup>421</sup> In that sense, the court was profoundly influential. And despite the relative conservativeness of the substantive legal changes, the institution of civil divorce has also had profound effects on the modern family. As the legal double-standards have been slowly eliminated, the rates of divorce petitions by men and women have actually changed very little, with women still filing slightly more than half of all marital termination actions.<sup>422</sup> When it was harder for women to get a divorce, they still did so at roughly equal rates to men.<sup>423</sup> What this tells us about the law's influence on divorce rates may be rather humbling to those of us who believe the law has important influence on social practices.

One of the facts that I find particularly disturbing, though perhaps not unexpected, is the infrequency of child custody and property orders emanating from the new court. Although the total numbers seem low—within the 10% to 20% range<sup>424</sup>—they may be quite high under the circumstances. Exploring the lives of the men and women who came before the court to discover their motives and desires is clearly further work that remains to be done. While the court may not have provided many wives with post-divorce property protection, we cannot say that these women were worse off, were left to starve or rely on charity, or even would have wanted future support. Their lives, motives, and desires remain unknown. But this research has uncovered some important information; namely, that child support orders, joint custody, property settlements, and damages awards were utilized in the mid-nineteenth century even though we often assume they

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421. See *infra* tbl. 3.

422. STONE, ROAD TO DIVORCE, *supra* note 2, at 386 (showing wives receiving more than 70% of divorce decrees in 1886).

423. See *infra* tbl. 5 and discussion *supra* Part V.B.

424. See *infra* tbls. 11–15, 19–21.



are fairly modern legal innovations. And the scarcity of these awards suggests that for most men and women, marital termination was their principal goal; they did not use the court for strategic ends.

Most important, the information recorded in these court records is invaluable for giving us a small window into the lives of many urban middle-class marriages, albeit dysfunctional ones. From this window we see how people's use of legal remedies changed as the law changed, as their marriages aged, and as their circumstances evolved. The amount of adultery, cruelty, desertion, and other significant events seems to have fluctuated over the course of most marriages. People's responses to these events also differed as their marriages aged. While much more work remains to be done with these materials, I hope to shed some light on the relationship of mid-nineteenth-century families to law and courts. Moreover, I hope this study has inspired others to investigate further how and why the people who chose to go to the law did so, and whether they got what they wanted. For only when we can begin to answer these questions can we know whether the law serves the needs of humans, or humans serve the needs of the law.

**APPENDIX**





Table 3: Number of Petitions Filed (1858-1861)									
	1858		1859		1860		1861		Total
	Husband	Wife	Husband	Wife	Husband	Wife	Husband	Wife	
Divorce	151	87	135	74	113	99	44	25	728
Judicial Separation	4	69	9	74	3	57	0	13	229
Restitution of									
Conjugal Rights	3	4	5	5	3	12	1	3	36
Annulment	3	3	1	2	1	1	1	0	12
Total	161	163	150	155	120	169	46	41	1005



Table 5: Outcomes of Petitions Filed (1858-1861)\*

	Divorce		Judicial Separation		Restitution of Conjugal Rights		Annulment	
	Husband	Wife	Husband	Wife	Husband	Wife	Husband	Wife
Granted	278	200	10	86	1	5	2	1
Dismissed	68	33	4	30	2	5	3	2
Not Continued	81	48	3	94	8	12	2	3
Unknown	14	3	0	4	1	1	0	0
Total Filed	441	284	17	214	12	23	7	6

  

	Divorce		Judicial Separation		Restitution of Conjugal Rights		Annulment	
	Husband	Wife	Husband	Wife	Husband	Wife	Husband	Wife
Total Filed	441	284	17	214	12	23	7	6
Percentage Granted	63.04%	70.42%	58.82%	40.19%	8.33%	21.74%	28.57%	16.67%
Percentage Dismissed	15.42%	11.62%	23.53%	14.02%	16.67%	21.74%	42.86%	33.33%
Percentage Not Continued	18.37%	16.90%	17.65%	43.93%	66.67%	52.17%	28.57%	50.00%
Percentage Unknown	3.17%	1.06%	0.00%	1.87%	8.33%	4.35%	0.00%	0.00%

\* All petitions filed for 3 1/3 year period (580 from CD, 465 from BO)

Table 6: Grounds for Marital Termination (1858-1866) (Wives only)

Cause of Action	Final Disposition	Adultery, Bigamy, Cruelty & Desertion or Sodomy Ouster Impotence									
		Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty	Adultery & Cruelty
Divorce	Granted	0	43	35	2	1	2	3	12	2	1
	Dismissed N/C	3	7	1	1	1	0	0	3	0	0
Judicial Separation	Granted	13	5	3	0	0	2	1	1	1	0
	Dismissed N/C	3	3	2	0	0	15	1	2	0	0
Restitution of Conjugal Rights	Granted	14	4	3	0	1	35	2	1	0	0
	Dismissed N/C	0	0	0	0	0	0	0	0	0	0
Annulment	Granted	1	0	0	0	0	0	0	0	0	0
	Dismissed N/C	0	0	0	0	0	0	0	0	0	0
Unknown	Granted	0	0	0	0	0	0	0	0	0	0
	Dismissed N/C	0	0	0	0	0	0	0	0	0	0
Total		35	80	50	3	3	61	7	19	3	2
Total of all causes of action		13	48	38	2	1	17	4	14	2	1
Dismissed N/C	Granted	7	10	3	1	1	6	1	3	0	0
	Dismissed N/C	15	18	7	0	1	37	2	2	1	1







Table 9: Wives: Length of Marriage, Grounds, and Success Rate (1858-1866)

Table 9: Wives: Length of Marriage, Grounds, and Success Rate (1858-1866)																
Length of Marriage	Cause of Action			Grounds					Outcome - Divorce				Outcome - Judicial Separation			
	Divorce	J/S	Other	AC	A	C	AD/CD	D	Other	Gtd	Dism	N/C	Gtd	Dism	N/C	Total #
<5	25	25	6	20	5	17	2	4	8	15	4	6	8	1	16	56
5-10	34	28	5	21	7	16	15	4	4	21	5	8	8	1	19	67
10-15	43	19	3	27	4	13	14	2	5	30	4	9	7	6	6	65
15-20	20	18	2	15	6	6	8	2	3	17	1	2	7	2	9	40
20-25	15	15	2	7	5	5	12	1	2	11	1	3	7	1	7	32
25-30	6	11	1	2	7	4	3	0	2	4	0	2	2	4	5	18
>30	2	9	3	3	2	0	4	3	2	2	0	0	2	2	5	14
unknown	3	2	1	4	0	0	1	0	1	2	1	0	2	0	0	6
Total	148	127	23	99	36	61	59	16	27	102	16	30	43	17	67	298

Table 10: Husbands: Length of Marriage, Grounds, and Children (1858-1866)

Length of Marriage	Cause of Action				Grounds			Outcome			# children	Total
	Divorce	Jt Sep	Other		Adultery	Other		Gtd	Dism	N/C		
<5	38	1	5		37	7		26	2	16	0.2	44
5-10	73	1	1		74	1		51	12	12	1.04	75
10-15	62	2	0		62	2		43	7	14	1.8	64
15-20	25	2	1		26	2		15	7	6	1.6	28
20-25	21	0	0		21	0		12	1	8	2.3	21
25-30	8	1	1		8	2		7	2	1	3.7	10
>30	5	0	0		5	0		2	1	2	2.4	5
Unknown	1	1	1		1	2		1	0	2	2.3	3
<b>Total</b>	233	8	9		234	16		157	32	61		250

Table 11: Requests for Custody in Petitions (1858-1866)													
Year	Total Requests	Requests by Mother	Requests by Father	# C/A granted	# C/A Continued	# C/A Not Dism.	# Custody Orders	# Orders for Mother	# Orders for Father	Custody Orders Denied	# Petition with Desertion		
1858	7	6	1	4	3	0	3	2	1	0	3		
1859	4	4	0	3	1	0	2	2	0	0	1		
1860	6	5	1	2	3	1	1	1	0	1	2		
1861	5	5	0	2	2	1	2	2	0	0	1		
1862	6	6	0	3	3	0	1	0	1 access	0	2		
1863	9	8	1	6	1	2	2	2	0	0	2		
1864	9	8	1	6	3	0	2	2	0	0	2		
1865	9	6	3	5	4	0	0	0	0	0	2		
1866	4	4	0	2	2	0	2	2	0	0	0		
unknown	3	3	0	3	0	0	3	3	0	0	1		
Total	62	55	7	36	22	4	18	16	2	1	16		

Table 12: Custody Petitions by Length of Marriage (1858-1866)								
Number of Years Married	Total Number of Petitions	Number of Custody Petitions by Wife	Number of Custody Petitions by Husband	Number of Mothers		Number of Fathers		Success Rate for Mothers by percentage
				Granted	Custody	Granted	Custody	
<5	8	8	0	5	0	0	63	
5-10	20	17	3	2	0	0	10	
10-15	18	16	2	5	1 access		28	
15-20	11	10	1	3	0	0	27	
>20	5	4	1	1	1	1	20	
Total	62	55	7	16	1	1	29	

Table 13: Custody Petitions By Number of Children (1858-1866)		
Number of Children	Number of Custody Petitions by Wife	Number of Custody Petitions by Husband
1	18	2
2	16	0
3	7	1
4	5	2
5	3	0
6	5	0
7	0	2
Total	54	7

Table 14: Requests for Custody in Docket (1858-1861)					
Husband			Wife		
	Divorce	RCR	Divorce	J/S	RCR
Custody Arrangements					
Granted	5	0	30	18	0
Dismissed	1	1	2	1	0
C/A N/C	1	0	2	1	1
Tot C/As	7	1	34	20	1
Custody Orders					
Gtd for F	4	1	0	0	0
Den for F	1	0	0	0	0
Gtd for M	1, 1 acc	0	29, 1 acc	16	0
Den for M	0	0	3	1, 1 acc	1
Joint	0	0	1	2	0
Total Orders	7	1	34	20	1



Table 16: Length of Time To Grant or Deny Protective Order (1858-1861)	
<i>Number of Weeks</i>	<i>Number of Petitions Resolved</i>
0-1	30
1-2	13
2-3	8
3-4	6
4-7	3





Table 18: Length of Time between Petition for Property Protection and Desertion (January 1858 to July 1861)		
Number of years since desertion	Number of Petitions	
>10	37	
5-10	27	
3-5	13	
<2	23	
Total	100	

Table 19: Damage Awards (1858-1861)			
Amount of Damages (Pounds)	Number of Awards	Settled on Wife or Children	
1	7	0	
2-50	6	1	
100-200	3	1	
200-500	2	1	
500-1,000	3	2	
2,000	1	0	
3,000	1	1	
10,000	1	0	
TOTAL	24	6	
Total Number of Actions Brought by Husbands		441	

Table 20: Property Settlements on Wives (1858-1861)		
Actions by Wife		Types of Settlements
Divorce	7	Settlements in Trust
Separation	1	Settlements for Children
Actions by Husband		Settlements on Wife
Divorce	5	One-Time Payments
Separation	0	Adjustments of Inheritance
Total Number of Property Settlements	13	Unknown

Table 21: Alimony Awards (1858-1861)												
Underlying Cause of Action	Divorce		Judicial Separation		Restitution of Conjugal Rights		Annulment		Unknown			
	Alimony Orders	Husband	Wife	Husband	Wife	Husband	Wife	Husband	Wife	Husband	Wife	
Granted	87	36	16	2	31	0	1	1	0	0	0	
Dismissed	31	11	8	0	10	0	0	0	0	0	2	
Not Continued	35	11	3	0	15	2	1	0	0	0	3	
Total Filed	153	58	27	2	56	2	2	1	0	0	5	

Table 22: List of Professions of Wives and Husbands		
Wife		Husband
Public Housekeeper		Sailor 4
Sells Trimmings		Gambler
Living in Workhouse		In Prison 5
Milliner		Servant to Dr. Lushington
Cook	2	Miner
Dressmaker		Manager of Silk Company
		Carpenter 4
		Fisherman 2
		Printer
		Railroad Porter
		Landscape Painter
		Horse Guard
		Publican
		Watchmaker
		Valet
		Engineering Worker
		Music Teacher
		Ship's Carpenter
		Minister
		Clerk
		Solicitor
		Plumber
		Captain in Highlanders
		Officer in East India Co.
		Soldier

**Table 23: Alimony Orders in Docket (1858-1861)**

<i>Amount</i>	<i>Husband</i>			<i>Wife</i>		
	<i>Number</i>	<i>Divorce</i>	<i>J/S</i>	<i>Divorce</i>	<i>J/S</i>	<i>Other</i>
0-25	34	16	1	4	12	1
26-50	49	19	1	9	18	2
51-75	29	8	0	19	11	0
76-100	16	4	0	5	6	1
101-150	10	4	0	3	2	1
151-200	6	1	0	1	4	0
201-300	5	4	0	0	1	0
301-400	1	0	0	0	1	0
401-500	2	1	0	0	1	0
501-600	0	0	0	0	0	0
601-700	1	1	0	0	0	0
<b>Total</b>	153	58	2	32	56	5

**Table 24: Costs (1858-1861)**

<i>Costs in Pounds</i>	<i>Suit by Husband</i>			<i>Suit by Wife</i>		
	<i>Div.</i>	<i>Jud. Sep.</i>	<i>Rest. Conj. Rts.</i>	<i>Div.</i>	<i>Jud. Sep.</i>	<i>Rest. Conj. Rts.</i>
<50	30	2	0	9	8	1
51-100	30	1	1	18	12	4
101-150	7	3	0	6	13	0
151-200	6	0	0	7	3	0
>201	13	0	1	3	6	0